No. 88-5014-CFY
Status: GRANTED

Title: Jose Gomez, Petitioner
v.
United States

Docketed:
July 5, 1988

Court: United States Court of Appeals
for the Second Circuit

Vide:
88-5158

Counsel for petitioner: Rudin,Joel B.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 5 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 3 1988		Order extending time to file response to petition until September 6, 1988.
5	Aug 15 1988	N	Motion of petitioner Jose Gomez to defer consideration of the petition filed.
8	Sep 6 1988		Order further extending time to file response to petition until November 7, 1988.
7	Oct 3 1988		Supplemental brief of petitioner Jose Gomez filed.
9	Nov 3 1988		Brief of respondent United States filed. VIDED.
10	Dec 1 1988		DISTRIBUTED. January 6, 1989
12	Jan 9 1989		Petition GRANTED. The case is consolidated with 88-5158, and a total of one hour is allotted for oral argument.
			**********
13	Feb 10 1989		Joint appendix filed. VIDED.
14	Feb 22 1989		Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
15	Feb 28 1989		Brief of petitioner Jose Gomez filed. VIDED.
16	Mar 8 1989		SET FOR ARGUMENT, APRIL 24, 1989. (4th CASE)
17	Mar 17 1989		Record filed.
		*	4 vol.
18	Mar 31 1989		Brief of respondent United States filed. VIDED.
19	Apr 3 1989		CIRCULATED.
20	Apr 10 1989	X	Reply brief of petitioner Jose Gomez filed. VIDED.
21	Apr 24 1989		ARGUED.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO: 88 5014

RECEIVED
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SUPREME COURT, U.S.

Jose Gomez, Petitioner,

VS

United States of America, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON WRIT OF CERTIORARI

The petitioner, Jose Gomez, Pro se, request leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously had retained counsel, but due to a lack of funds must now proceed in pro se and forma pauperis. Petitioner's affidavit in support of this motion is attached hereto.

Done this 30th day of June, 1988.

Respectfully submitted,

Jose Gomez

Jose Gomez
No: 22348053 Unit-M
Federal Correctional Institution
P. O. Box 888
Ashland, Kentucky 41105-0888

Supreme Court, U.S.
FILED
JUL 05 1988
JOSEPH F. SPANIOL, JR.
CLERK

Jose Gomez 88 5014

Petitioner

v.

United States of America

ORIGINAL

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Jose Gomez being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ✓ No ____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   Federal Correctional Institution at Ashland, Ky. $16 per Month

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes ____ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   N/A

Supreme Court, U.S.
FILED
JUL 05 1988
JOSEPH F. SPANIOL, JR.
CLERK

3. Do you own any cash or checking or savings account? Yes ____ No ✓

   a. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

   N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Jose Gomez

/s/ Jose Gomez

Subscribed and sworn to before me this 29TH day of June, 1988.

B Sharp

Case Manager for Inmate

Notary

My commission expires N/A

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987
NO. 88 5014

ORIGINAL

Jose Gomez, Petitioner,

Vs

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Supreme Court, U.S.
FILED
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CLERK

Jose Gomez
No: 22348053 Unit-M
Federal Correctional Institution
P. O. Box 888
Ashland, Kentucky 41105-0888

THE QUESTIONS PRESENTED FOR COURTS REVIEW

1. Jury Selection By A Magistrate Instead Of An Article III Judge, Over Gomez's Objection, Violated His Constitutional And Statutory Rights.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988
NO 88 5014

ORIGINAL

Jose Gomez, Petitioner,

Vs

United States of America, Respondent.

Supreme Court, U.S.
FILED
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CLERK

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Jose Gomez, Pro se, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 1, 1988.

OPINION BELOW

The Court of Appeals entered its "Per Curiam" memorandum decision affirming the error of the court below on June 1, 1988. A copy of the opinion is attached as Appendix A. Petitioner's retained counsel did not file for a rehearing against the petitioner's request for a petition for rehearing, with the suggestion for rehearing en banc. Thus, no rehearing was held in this case.

JURISDICTION

On June 1, 1988, the Court of Appeals entered judgment affirming the petitioner's conviction. (App. A). The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1); Rules 46; 21.1(K); 28; 20.4; Rules of the United States Supreme Court.1/.

CONSTITUTIONAL PROVISION INVOLVED

"Nor shall any person.....be deprived of life, liberty, nor property, without due process of law....." (Const. Amend. V)

PRELIMINARY STATEMENT

Jose Gomez seeks certiorari from a judgment of the United States Court of Appeals affirming the conviction and sentence entered on June 1, 1988, for federal narcotics violations, which conviction and sentence was obtained following a jury trial.

Gomez and ten co-defendants were charged in a superseding indictment containing a total of twenty-one counts. Count one charged Jose Danery Garcia

1/ There are four parties with an interest in the outcome of this case. Jose Gomez (Petitioner); William Salazar, Beimar Vallejo; and the United States of America, respresented by the U.S.Attorney c/o Sean P. O'Shea, Assistant U.S.Attorney; Brooklyn, New York.

and Damaris Sanchez with operating a criminal enterprise between September 1985 and March 1986, for the distribution of cocaine, in violation of the **Rico Statuto**, Title 18, United States Code, Section 1962(c) and Section 1963. This count alleged seven acts of narcotics-related racketeering against Garcia and Sanchez; none of them involved the petitioner. Count two named William Salazar and Diego Chavez-Tesina as operators of a second narcotics eterprise between January and March 1986, inclusive. It alleged five acts of racketeering, but only one involved Gomez; a conspiracy between March 15th and 18th in 1986, with Salazar, to distribute a "substantial quantity" of cocaine. This conspiracy and distribution were the subjects of counts 15 and 16, respectively, the sole counts against the petitioner, Gomez.

The indictment also aleged seven additional conspiracies to distribute cocaine among different combinations of the other defendants, (Counts 3, 5, 7, 9, 11, 17 and 19). The remaining counts (4, 6, 8, 10, 12, 13, 14, 18, 20 and 21), alleged substantive narcotics-related crimes by those other defendants.

On August 4, 1986, Gomez moved for a severance under Federal Rules of Criminal Procedure, Rule 8(b) and 14, arguing misjoinder and the inherent unfairness of a joint trial. "The purpose of the clause in the United States Constitution in respect to equal protection of the law is to rest the rights of all persons upon the same rule under similar circumstances." **Frost V. Corporations Commission**, 278 U.S. 515. By letter dated August 21, 1986, Vallejo joined in this motion. In a nine page written dicision dated November 30, 1986, the district court denied the motion, holding that the jury would be able to compartmentalize the evidence as to each defendant, particularly if "properly instructed"

On November 20, 1986, at a pre-trial conference, jury selection was scheduled before a United States Magistrate.2/ On February 9, 1987, jury selection was held before Magistrate Chrein who denied Constitutional and statutory objections of Gomez and two other defendants to the selection of a jury by other than a district judge.3/ On February 17, 1987, this objection was repeated to Judge McLaughlin, who denied it after offering de novo review of any denial challenges for cause. (Tr. 11-14).4/

Trial of the petitioner began on February 17, 1987. During trial, petitioner repeatedly requested limiting instructions regarding evidence inadmissible against him, but the court refused virtually every request despite Federal Rules of Criminal Procedure, Rule 105. Additionally, the Governments' introduction of numerons tape-recorded conversations and physical evidence pertaining to multi kilogram cocaine transactions in which Vallejo and Gomez were not remotely involved prompted petitioner to renew their severance motions. Petitioner also repeatedly objected to the Governments' use of "expert" testimony by narcotics agents concerning the petitioners' alleged use of coded language, and to the admission of co-conspirator hearsay uttered well outside the dates of the three day conspiracy alleged in count 15 against Gomez. Although the court repeatedly promised to give appropriate limiting instructions at the end of the trial, it

2/ A transcript of this court session cannot be located by the court Reporter's Office.
3/ February 9, 1987, Tr.(a.m.) at 15-16; February 9, 1987, Tr.(P.M.) at 2-7.
4/ References to the trial transcript will be as follows: (Tr.___).

failed to do so.

On February 27, 1987, petitioner was convected on both counts 15 and 16.

On April 29, 1987, petitioner was sentenced to ten years imprisonment on each count to be served concurrent with each other, and a special parole term of ten years was imposed, and a $100.00 total assessment fine. Timely notice of appeal was filed, and on June 1, 1988, the United States Court of Appeals for the Second Circuit affirmed the lower court. This application for certiorari follows the Appeals Court affirming.

JURY SELECTION BY A MAGISTRATE INSTEAD OF AN ARTICLE III JUDGE OVER GOMEZ'S OBJECTION DID VIOLATE HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO A FAIR TRIAL

Over the objection of petitioner Gomez, jury selection in this case was conducted by a magistrate rather than an Article III district court judge. The Supreme Court has never addressed the constitutionality of delegating jury selection in a felony trial to a magistrate over defense objections. Also, in **United States V. DePiore**, 720 F.2d 757, 764-65 (2nd Cir.1983); **Cert. Den.**; 466 U.S. 906(1984), the court held the issue was not preserved due to the fact the defendant's failure to make a contemporaneous objection. Petitioner Gomez would contend that **DePiore, supra**, was wrongly decided because an Article III objection to the court's jurisdiction cannot be waived. Nevertheless, because such a procedure exceeds the scope of authority Congress intended to authorize under the Federal Magistrates Act, and violates Article III and the Due Process Clause of the United States Constitution, the judgment of the Court of Appeals should be reversed.

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." **Art. III § 1.**

The same section defines an Art. III judge as a judicial officer enjoying life tenure, subject only to removal by impeachment, retirement or death, whose compensation is irreducible. **Id. Art. III** "commands that the independence of the judiciary be jealously guarded, and it provides clear institutional protections for that independence." **Northern Pipeline Construction Company V. Marathan Pipeline Company**, 458 U.S. 50, 60 (1982).

Magistrates, who serve eight year terms and are subject to removal by the District Court or the termination of their eight year term in office by the Judicial Conference, clearly are not Article III Judges, since they are "unprotected by the safeguards that the framers reguarded as indispensable to assuring the independence of the federal judiciary." **United States V. Raddatz**, 447 U.S. 667, 704 (1980); **Horton V. State Street Bank & Trust Company**, 590 F.2d 403 (1st Cir 1979); Title 28, United States Code, Section 631 **et seq.**

The federal courts must protect against the "wholesale delegation of the judicial power" to non-Art. III judges, even as "adjncts of the district court." **Collins V. Foreman**, 729 F.2d 108, 119 (2nd Cir.); **cert. den.**; 469 U.S. 870 (1984). In **Northern Pipeline Construction Company V. Marathan Pipeline Company, supra**, the Supreme Court held that the Bankruptcy Act of 1978, by creating specialized courts staffed by judges without life-time tenure or irreducible salaries, violated Art.III. The court rejected the Governments' argument that Congress could create "courts free of Art. III's requirements wherever it finds that course expedient", observing that such a view "provides no limiting principle....(and)

threatens to supplant completely our system of adjudication in independent Art. III tribunals...." **Id. at 73.** The court also rejected the Governments' alternative argument that the bankruptcy court was merely an "adjunct" of the district court, objecting to the act's assignment of all ordinary powers of the district court to the bankruptcy court, including the power to preside over jury trials. **Id. at 85-86. Horton V. State Street Bank & Trust Company, supra** (under Art. III, Magistrate may not enter final appealable judgments). The courts also have narrowly construed the Federal Magistrates' Act so as to violate Art. III. **Wingo V. Wedding**, 418 U.S. 461 (1974), (The 1968 Magistrates Act did not authorize Magistrates to conduct habeas corpus evidentiary hearings); **Wimmer V. Cook**, 774 F.2d 68 (4th Cir.1985), (Magistrate may not conduct civil rights jury trial without parties consent); **Ford V. Estelle**, 740 F.2d 374 (5th Cir.1984).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Would the court respectfully review **United States V. Ford**, 824 F.2d 1430 (5th Cir.1987) **en banc**; **cert. den.** 108 S.Ct. 741 (1988), which held, that at the very least, the practice of permitting magistrate's to conduct jury voir dire in felony cases raises serious constitutional questions. Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminds us:

> "...because the impartiality of the adjudicator goes to the very integrity of the legal system." **Id. at 1435** (quoting **Gray V. Mississippi**, 107 S.Ct. 2045, 2056 (1987).

The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, **Swain V. Alabama**, 380 U.S. 202, 219(1965), but the prosecutor's use of peremptory challehges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection Clause. **Batson V. Kentucky**, 476 U.S. 79, 88-89(1986). And, while double jeopardy does not attach until the jury is sworn, **Crist V. Bretz**, 437 U.S. 28, 35(1978), the Sixth Amendment rights of a defendant to a speedy and public trial, accord Speedy Trial Act, Title 18, United States Code, Section 3161 through Section 3174 (1982 & Supp. IV 1986), to be present while a jury is selected, **Lewis V. United States**, 146 U.S. 370, 376(1892); **United States V. Crutcher**, 405 F.2d 239, 242-43(2nd Cir 1968), **cert. den.** 394 U.S. 908(1969); Federal Rules of Criminal Procedure, Rule 43(a), and the assistance of counsel during jury selection, **Brewer V. Williams**, 430 U.S. 387, 399(1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it, **Smith V. Phillips**, 455 U.S. 209, 217(1982), it follows that the right to such a jury attaches the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, petitutioner feels, is at best maybe.

The district court's review of a magistrate's rul g on challenges would surely be difficult, as Judge Higginbotham pointed out in **United States V. Ford**, 824 F.2d at 1436-37, and would undoubtedly lead to appeals on the issue to the circuit courts. Perhaps the district courts have the inherent power simply to conduct a voir dire a second time. **United States V. Raddatz**, 447 U.S. 667(1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. **United States V. Ford**, 824 F.2d at 1437; but see id. at 1446. In any event, no clear-cut answer can be forthcoming unless and until the United States Supreme Court decides the constitutional question. This court held in **Kensella V. United States**, 361 U.S. 234, that due process is denied where a defendant is deprived of the fundamental fairness which is most essential to the very concept of justice. See also **Payne V. Arkansas**, 356 U.S. 560.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to the mind of petitioner a bad one. Intending no offense toward magistrates', delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judges from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." **Smith V. Phillips**, 455 U.S. at 217. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel shortchanged, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process as well. **Payne V. Arkansas**, **supra**; **Kensella V. United States**, **supra**.

A conflict between the circuits has arisen on the application of the direct review rule during the pending of a petition for rehearing. In this case, the Second Circuit refused to reverse the original judgment against petitioner even with the fact this court, as well as statute and the United States Constitution, make it clear a magistrate is not to select the jury. See **United States V. McCann**, 431 F.2d 1103, 1110. This conflict between the circuits and the uncertainty created by the Second Circuit opinion require resolution by this cout.

CONCLUSION

For the forgoing reasons, petitioner Jose Gomez, respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Done this the 28th day of June, 1988.

Respectfully submitted,

Jose Gomez

Jose Gomez
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 238, 239, 240, 241, 242—August Term 1987

(Argued October 19, 1987 Decided June 1, 1988)

Docket Nos. 87-1243, 87-1244, 87-1245, 87-1246, 87-1264

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,

Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,

Defendants-Appellants.

Before:

OAKES, CARDAMONE and MAHONEY

Circuit Judges

APPENDIX-A

Defendants William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera appeal from the May, 1987 judgments of conviction for narcotics-related offenses entered by the United States District Court for the Eastern District of New York (McLaughlin, J.) after a jury trial.

Judgments affirmed.

Judge Oakes dissents in a separate opinion.

THOMAS E. NOOTER, New York, New York (Freeman, Nooter & Ginsberg, New York, New York, of counsel), *for Appellant Beimar Vallejo.*

JOEL B. RUDIN, New York, New York (Mass & Rudin, New York, New York, of counsel), *for Appellant Jose Gomez.*

BERT H. NISONOFF, Forest Hills, New York, *for Appellant Hugo Shanks-Carrera.*

JERALD LEVINE, Jackson Heights, New York, *for Appellant Diego Chavez-Tesina.*

HARRY C. BATCHELDER, JR., New York, New York, *for Appellant William Salazar.*

SEAN F. O'SHEA, Assistant United States Attorney, Brooklyn, New York (Andrew J. Maloney, United States Attorney, Eastern District of New York; John Gleeson and Emily Berger, Assistant United States

Attorneys, of counsel), *for Appellee United States of America.*

CARDAMONE, *Circuit Judge*:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is entitled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (McLaughlin, J.) for narcotics-related offenses.

FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's cus-

tomers. Salazar mentioned that his business partner, a Columbian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered Chavez-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chavez-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the

building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine—the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar—and verifying that that transaction involved cocaine—as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts of the indictment, the broadest of which alleged that Salazar and Chavez-Tesina conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chavez-Tesina, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving

the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chavez-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed. R. Crim. P. 8(b), 12(b), and 14. After jury selection—presided over by a magistrate—trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chavez-Tesina for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with the intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrera was acquitted on the conspiracy charge. This appeal followed. We affirm.

DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate—rather than a district court judge—may preside during jury selection.

I *Jury Selection by a Magistrate*

Judge McLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.") Salazar, Chavez-Tesina, and Gomez objected to the delegation at the beginning of *voir dire* and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants *de novo* review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent, appellants declined the offer. There is no claim of prejudice from the delegation of the *voir dire* to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defendant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

A. *Statutory Provisions*

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C.

§§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. *See, e.g., Wingo v. Wedding*, 418 U.S. 461 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1] provides that a magistrate may hear and determine pretrial matters—with certain enumerated exceptions—subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2] a magistrate may conduct hearings on

1 Section 636(b)(1)(A) provides:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (1982).

2 Section 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that

> [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

Id. § 636(b)(1).

specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to *de novo* determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in *United States v. DeFiore*, 720 F.2d 757, 765 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury selection in felony cases. *Haith v. United States*, 342 F.2d 158, 159 (3d Cir. 1965) (per curiam) (failure to object to or claim prejudice from delegation waives right to contest delegation), *aff'g* 231 F. Supp. 495 (E.D. Pa. 1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may—consistent with both § 636 and the Constitution—preside over jury selection despite the defendant's objection so long as *de novo* review is available in the district court. *See United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir.),

cert. denied, 474 U.S. 847 (1985); *United States v. Bezold*, 760 F.2d 999, 1002 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986); *see also United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir. 1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting *en banc* determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. *See United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 741 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

> [t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that *it is not restricted in any way by any other specific grant of authority to magistrates.*
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

19 House Report, *supra*, at 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); *see also* S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selection, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment *beyond* duties traditionally categorized as "pretrial." Hence, even assuming *arguendo* that jury selection falls on the "trial" side of the line between "trial" and "pretrial"—a line that is, at best, often blurred—the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(3) (1982), and jury or nonjury civil trials, *id.* § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases *without* consent of the parties. Yet conditioning the holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. *E.g.*, *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct.

3245, 3252 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Id.* Here, the legislative will is evident. As the Seventh Circuit stated, "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340-41 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979); *see also Ford*, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on § 636(b)(3) is Constitution or conflicting law).

B. *Constitutional Concerns*

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are tw spects to the separation of powers doctrine—a cornerstone of our federal constitutional structure—that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. *See Schor*, 106 S. Ct. at 3256; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc) (noting

dual components of separation of powers cases), *cert. denied*, 469 U.S. 824 (1984).

1. *Relationships Between the Three Branches*

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. *Schor*, 106 S. Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be . . . blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never . . . be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances—an integral com-

ponent of the constitutional structure—which serves to prevent each branch from encroaching on the power of the other. *The Federalist*, *supra*, No. 51, at 321-22 (J. Madison).

With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4257; *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for " 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .' " *Bowsher v. Synar*, 106 S. Ct. 3181, 3193-94 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,' " *Schor*, 106 S. Ct. at 3256 (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 105 S. Ct. 3325, 3336 (1985)), we examine the effect of such a delega-

tion. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, *id.* § 631(b), and decide what matters are assigned magistrates, *id.* § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the decision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's *encroaching upon* the power of another. *Cf. United States v. Raddatz*, 447 U.S. 667, 682-83 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. *See Raddatz*, 447 U.S. at 681-84 (upholding suppression hearing referred to magistrate with review); *Mathews v. Weber*, 423 U.S. 261, 271-72 (1976) (upholding social security benefit cases referred to magistrate with review); *see also Ford*, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981) (same). So long as the " 'essential attributes' of judicial power are retained in the Art. III Court," *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.

The availability of *de novo* review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In *Raddatz*, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, *id.* at 681, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," *id.* at 683. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors." *Id.* at 686 (Blackmun, J., concurring); *see also Northern Pipeline*, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing *Raddatz*); *Mathews*, 432 U.S. at 271 (final decision remains with judge); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III").

Similarly, the trial judge here was "waiting in the wings" and offered *de novo* review, which the appellants declined. Nor do appellants claim that *de novo* review would have been ineffective. *Raddatz* compels the conclusion that neither delegation of *voir dire* per se nor delegation under the facts of this case erodes the power and

independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. *Article III Rights*

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." *Schor*, 106 S. Ct. at 3256 (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. *E.g.*, *Schor*, 106 S. Ct. at 3256-57; *Pacemaker Diagnostic*, 725 F.2d at 541-42. Here, appellants affirmatively objected to the delegation of *voir dire* to a magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III, *cf. Schor*, 106 S. Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magistrate. While not minimizing the importance of jury selection in

the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during *voir dire* or to hear challenges for cause. *See Ford*, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, *see, e.g., Lewis v. United States*, 146 U.S. 370, 373-74 (1892), or on when a trial begins for purposes of the Speedy Trial Act, *see, e.g., United States v. A-A-A Elec. Co.*, 788 F.2d 242, 246 (4th Cir. 1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional protections attach can vary with the individual right involved. *Cf. Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501, 509 n.8 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of *de novo* review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts to dele-

gate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the Constitution where, as here, the district court affords *de novo* review of unsustained challenges to jurors for cause.

II *Single or Multiple Conspiracy*

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indicting for single versus multiple conspiracies arises frequently in criminal jurisprudence. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 755 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); *United States v. Nersesian*, 824 F.2d 1294, 1302-03 (2d Cir.) (evidence properly supported single conspiracy charge), *cert. denied*, 108 S. Ct. 357 (1987); *United States v. Miley*, 513 F.2d 1191, 1205-07 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States v. Borelli*, 336 F.2d 376, 378 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies—a recurring problem on appeal—Salazar contends that the reverse situation fatally impaired his trial.

We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." *Miley*, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspir-

acy, we would be hard pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. *Cf. Nersesian*, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected," *United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stone-faced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules governing joinder and severance still apply.

III *Joinder and Severance*

Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tesina. Joinder of these defendants in the same indictment was therefore proper under Fed. R. Crim. P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. *See United States v. Barton*, 647 F.2d 224, 239-40 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Gallo*, 668 F. Supp. 736, 748 (E.D.N.Y. 1986), *mandamus granted on other grounds*, 834 F.2d 283 (2d Cir. 1987); *United States*

v. Castellano, 610 F. Supp. 1359, 1396-97 (S.D.N.Y. 1985). The only question is whether denial of the Fed. R. Crim. P. 14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. *Nersesian*, 824 F.2d at 1303.

A. *Salazar*

The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a *severance* argument—as appellant contends—but rather a *relevance* argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. *See United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985). Hence, the denial of the severance motion must stand.

B. *Shanks-Carrera*

Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do

not mandate separate trials. *Nersesian*, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. *See, e.g., Weisman*, 624 F.2d at 1130.

In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

C. *Vallejo and Gomez*

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

IV *Evidentiary Issues*

A. *Rule 105 Limiting Instructions*

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's and Gomez's requests that limiting instructions be given contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when co-

conspirator statements were admissible against some—but not all—defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.
>
> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed. R. Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, *see* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065 (1977 & Supp. 1987), the weight of authority is to the contrary. *See United States v. Carson*, 702 F.2d 351, 367 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), *cert. denied*, 462 U.S. 1108 (1983); *United States v. Losada*, 674 F.2d 167, 171-72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), *cert. denied*, 457 U.S. 1125 (1982); *see also* 1 J. Weinstein, *Weinstein's Evidence* ¶ 105[05], at 105-44 (1986) ("The jury may be instructed either as the [limited] evidence is admitted *or as part of the general charge*.") (emphasis added; footnote omitted).

The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. *See United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984); *United States v. Dabish*, 708 F.2d 240, 243 (6th Cir. 1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. *See Losada*, 674 F.2d at 171-72 (looking for prejudice); *Weisman*, 624 F.2d at 1130 (same); *United States v. Toliver*, 541 F.2d 958, 963 (2d Cir. 1976) (same).

We include that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting instructions upon the admission of co-conspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. *See United States v. Teitler*, 802 F.2d 606, 617 (2d Cir. 1986). Further, the evidence admitted without contemporaneous instructions was physical evidence that lent itself to compartmentalized consideration. *See, e.g., Toliver*, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

B. *DEA Expert Testimony*

Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. *See Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400-01 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); *United States v. Young*, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

C. *Sufficiency of the Evidence*

Chavez-Tesina, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. *Losada*, 674 F.2d at 173. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), and all permissible inferences construed in its favor, *United States v. Dazzo*, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, 459 U.S. 836 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal intent may be established . . . through circumstantial evidence." *United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982). We examine in turn the evidence against each appellant.

1. *Chavez-Tesina*

Chavez-Tesina's convictions arose primarily out of his involvement in the 50 kilogram transaction. Salazar described his "partner" to de la Cova as a Colombian of Japanese descent who had lived in London. Chavez-Tesina matched the physical description and possessed a British driver's license and Colombian passport when he was arrested. When Salazar told de la Cova that his partner was travelling in New Orleans, independent evidence established that Chavez-Tesina was in fact then in New Orleans.

More important, there was testimony to the effect that Chavez-Tesina was in New Orleans looking for cocaine that would be acceptable in the New York market. As the transaction approached accomplishment, Salazar made telephone calls to Chavez-Tesina's home, confirmed by a pen register. The subject of these calls was the cocaine transaction. In one call, Salazar referred to the other party as "Diego," Chavez-Tesina's first name. The jury was entitled to believe that this evidence linked Chavez-Tesina to Salazar, the RICO enterprise, and the 50 kilogram deal.

2. *Vallejo*

Vallejo, a less active participant in the affairs providing the basis for the charges, was convicted of conspiracy to possess cocaine and possession with intent to distribute arising out of the March 17, 1986 two kilogram cocaine sale to de la Cova. Vallejo argues that there was no proof that he was involved in the conspiracy. The evidence, he argues, shows at best mere association with a drug dealer.

Agent de la Cova heard Salazar tell Vallejo on March 15th that he had something "very, very good." From this

the jury could reasonably conclude that Salazar referred to cocaine and that Vallejo comprehended this meaning. Just two days later, in Vallejo's presence, Gomez delivered two "favors" to Salazar. It is beyond dispute that Gomez delivered cocaine because Gomez said shortly before he was arrested that the "favors" were kilograms of cocaine. This cocaine subsequently was transported to Vallejo's house.

Further support for the inference that Vallejo was involved in a narcotics conspiracy and distributed cocaine is the fact that he delivered a small amount of cocaine to Salazar on March 21st—only moments after Salazar called and asked for some. When he was arrested, Vallejo had a beeper, $2000 in cash, a small amount of drugs and drug paraphernalia, again evidencing that his business relationship with Salazar related to the narcotics trade. *See Carson*, 702 F.2d at 368. This proof, as well as the reasonable inferences arising from it, supports the jury's finding that Vallejo was a knowing participant in the conspiracy.

3. *Shanks-Carrera*

Shanks-Carrera was alleged to be a supporting player in the 50-kilogram transaction. It was he whom the DEA observed carrying a duffel bag—later found to be filled with cocaine—into the apartment arranged as the delivery site. Shanks-Carrera was acquitted of conspiracy, but convicted of possession.

Testifying at trial, he claimed that he had no knowledge that the duffel bag contained cocaine. Appellant explained that incriminating statements made at the time of his arrest—and hiding when DEA agents arrived—were the results of fear and a desire to protect his brother, who allegedly gave him the duffel bag. The jury was in a better position to assess these issues of credibility. Viewing the

evidence in the light most favorable to the government, we find it sufficient to establish that the appellant possessed cocaine with the intent to distribute it.

CONCLUSION

Accordingly, for the reasons discussed above, the judgments of conviction are affirmed.

OAKES, *Circuit Judge* (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of permitting magistrates to conduct jury voir dire in felony cases raises serious constitutional questions. *See United States v. Ford*, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 741 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." *Id.* at 1435 (quoting *Gray v. Mississippi*, 107 S. Ct. 2045, 2056 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, *Swain v. Alabama*, 380 U.S. 202, 219 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 88-89 (1986).

And, while double jeopardy does not attach until the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 35 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, *accord* Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986), to be present while a jury is selected, *Lewis v. United States*, 146 U.S. 370, 376 (1892); *United States v. Crutcher*, 405 F.2d 239, 242-43 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); Fed. R. Crim. P. 43(a), and to the assistance of counsel during jury selection, *see Brewer v. Williams*, 430 U.S. 387, 399 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in *United States v. Ford*, 824 F.2d at 1436-37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. *See United States v. Raddatz*, 447 U.S. 667 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. *See United States v. Ford*, 824 F.2d at 1437; *but see id.* at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forth-

coming unless and until the Supreme Court decides the constitutional question.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. at 217. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel shortchanged, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I cannot think that the practice—at least in a jurisdiction such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire—is one that can save much judicial time. It is a practice that is

not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.

FILE
88-5014

Nos. 88-5014
88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, DIEGO CHAVEZ-TESINA,
WILLIAM SALAZAR and BEIMAR VALLEJO, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Does the Federal Magistrates Act authorize a district judge, over a criminal defendant's objection, to delegate jury selection in a felony trial to a magistrate while reserving authority to review de novo the magistrate's rulings on challenges for cause?

II. Does a district judge's delegation of jury selection to a magistrate, with reservation of de novo review authority concerning unsuccessful defense challenges for cause, violate a felony defendant's Article III and Due Process rights?

Nos. 88-5014
88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, DIEGO CHAVEZ-TESINA,
WILLIAM SALAZAR and BEIMAR VALLEJO, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners, Jose Gomez, Diego Chavez-Tesina, William Salazar and Beimar Vallejo, respectfully request that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on June 1, 1988 (petition for rehearing en banc denied August 4, 1988).[1]

The circuit court's 2-1 decision (Oakes, C.J., dissenting) affirmed petitioners' narcotics-related convictions despite their statutory and constitutional objections to jury selection by a magistrate in place of an

1 Petitioners Jose Gomez, No. 88-5014, and Diego Chavez-Tesina, No. 88-5158, previously filed pro se petitions for certiorari and motions to proceed in forma pauperis. As explained in Gomez's motion to defer consideration of his petition dated August 11, 1988, Gomez proceeded pro se in the mistaken belief that, due to lack of additional funds, his retained attorney would not file a petition. Chavez-Tesina acted under the same misapprehension. By letter dated September 2, 1988, the Solicitor General agreed that deferral was warranted until this supplemental petition was filed.

Article III judge. Petitioners were convicted after a jury trial in the United States District Court for the Eastern District of New York before the Honorable Joseph M. McLaughlin, District Judge. Jury selection was held before Magistrate A. Simon Chrein.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are reported at 848 F.2d 1324, entitled United States v. Garcia, and are reprinted in the appendix hereto at pp. 1a-15a. The court's denial of the petition for rehearing en banc appears in the Appendix at 16a.

The United States District Court for the Eastern District of New York (McLaughlin, D.J.) wrote no opinion in this case. The transcript of proceedings relevant to the district court's decision to proceed with jury selection by the magistrate, and appellants' objections thereto, is reproduced in the appendix at 17a-23a, infra.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Article III, Section 1 of the United States Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution (in pertinent part):

> No person shall be ... deprived of life, liberty, or property, without due process of law ...

Title 28, United States Code, Section 636 (in pertinent part):

> **§ 636. Jurisdiction, powers, and temporary assignment.**
>
> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment --
>
> * * *
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (b)(1) Notwithstanding any provision of law to the contrary --
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

* * *

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary --

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves....

Rule 1 of the Rules for Proceedings Before Magistrates in the Southern and Eastern Districts of New York:

Jurisdiction - 28 U.S.C. Section 636

Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.

STATEMENT OF THE CASE

Prior to jury selection in this criminal trial on February 9, 1987, petitioners Gomez, Salazar and Chavez-Tesina, through counsel, objected on statutory and constitutional grounds to the district judge's delegation of jury selection to a magistrate.[2] Nevertheless, after consulting the district judge, the magistrate proceeded with voir dire and selected a panel. On February 17, 1987, Salazar repeated petitioners' objection to Judge McLaughlin, who denied it after offering de novo review of the magistrate's determination of defense challenges for cause. Petitioners declined this offer, the only juror challenged for cause having been excused by the magistrate. United States v. Garcia, 848 F.2d at 1327.

On February 27, 1987, petitioners were convicted by their magistrate-selected jury of narcotics-related charges and subsequently were sentenced to varying terms of imprisonment.[3]

In their appeal, petitioners argued that Congress did not intend the Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107, reprinted in 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)), to authorize magistrates to conduct jury selection in felony trials. Petitioners pointed out that Congress had specifically delineated the pre-trial proceedings and, upon consent, civil and misdemeanor criminal trials which a magistrate may conduct, but nowhere authorized a magistrate to conduct any part of a felony trial. The 1968 Magistrate Act's principal sponsor,

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2 Counsel for Vallejo did not object.

3 The total sentences of imprisonment were as follows: Gomez (10 years), Chavez-Tesina (15 years), Salazar (15 years), and Vallejo (7 years).

Sen. Joseph Tydings, explicitly testified that Congress did not intend to permit a magistrate to conduct a felony trial. Thus, the statute's additional "catch-all" provision, § 636(b)(3), which authorizes a magistrate to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," could not be construed to authorize voir dire delegation. Finally, petitioners maintained that, even if Congress had intended to permit magistrates to conduct felony voir dire, a district judge's delegation of such authority to a non-Article III officer, particularly over the defendant's objection, violates both Article III and the Due Process Clause of the Fifth Amendment.

The government responded in its brief that Congress did in fact intend the "catch-all" provision to permit federal judges to delegate jury selection to magistrates. Citing several supportive cases, including United States v. Ford, 797 F.2d 1329 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 964 (1987), the government argued that the de novo review procedure adopted ad hoc by the district court sufficiently safeguarded petitioners' constitutional right to a trial before an Article III judge.

Prior to oral argument of this appeal, the Fifth Circuit, sitting en banc, voted 10 to 4 to reverse the Ford panel and to hold that the Magistrates Act did not authorize delegation of jury selection to a magistrate, even with a reservation by the district judge of de novo review authority. Judge Higginbotham's majority opinion, joined by eight of his colleagues, stated that an opposite construction would raise "grave constitutional issues." United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1988) (en banc). However, because Ford had not objected to the procedure in the District Court, the en banc court again

affirmed the conviction.

Although the United States opposed Ford's petition for certiorari due to Ford's district court "waiver," the government conceded that magistrate-conducted jury voir dire "is an important issue that will likely warrant review by this Court in an appropriate case..." Brief for the United States in Opposition to the Petition for Certiorari, Ford v. United States, Docket No. 87-5570, at 12. While the Court denied certiorari, Mr. Justice White dissented, reasoning as follows:

> If the decision below is []correct, and this use of the magistrate violates either the Act or the Constitution, then it is not obvious that this violation can be dismissed under the "plain error" doctrine. And the position of the Fifth Circuit on this issue conflicts with two decisions of the Ninth Circuit. United States v. Peacock, 761 F.2d 1313, 1317-1319 (CA9), cert. denied, 474 U.S. 847 (1986); United States v. Bezold, 760 F.2d 999, 1001-1003 (CA9 1985), cert. denied, 474 U.S. 1063 (1986). See also United States v. Rivera-Sola, 713 F.2d 866, 872-873 (CA1 1983) (dictum). The split among the Circuits on this issue warrants our granting certiorari.

Ford v. United States, ___ U.S. ___, 108 S.Ct. 741, 742 (1988)(Justice White dissenting from the denial of certiorari).

Taking direct issue with Ford, the Second Circuit in this case upheld the procedure for jury selection employed in the District Court against petitioners' statutory and constitutional attacks. Without discussing petitioners' citations to the legislative history, the court held that Congress had intended § 636(b)(3)'s "catch-all" provision to be "broad in scope and unrestricted by 'any other specific grant of authority to magistrates.'" United States v. Garcia, 848 F.2d at 1329. Similarly, the court rejected petitioners' Article III claim, reasoning that the district court's reservation of de novo review authority sufficiently

safeguarded petitioners' individual, Article III rights. Id. at 1331-32. Distinguishing the decisions of this and other courts stressing the fundamental importance of the voir dire process to a fair trial, the Court stated: "[E]ven if we accept appellant's premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection." Id. at 1332. The court did not specifically address the petitioners' Due Process Clause claim.

In his dissent, Judge Oakes took issue with the majority's narrow view of the voir dire process. That process, Judge Oakes noted, implicates the defendant's rights to due process, equal protection, an impartial jury, assistance of counsel, and a speedy trial; it "provides the foundation upon which the remainder of the trial is built." Id. at 1337 (Oakes, C.J., dissenting). He continued:

> Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, [455 U.S. 209, 217 (1982)]. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel short-changed, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate....

Id. at 1337-38.

Rather than forbidding magistrate-conducted jury selection altogether, as the Fifth Circuit did in Ford, Judge Oakes advocated prohibiting the practice under the court's supervisory power, except "possibly" with the consent of the parties, "and then only pursuant to rules controlling the district court's review." Id. at 1338.

Finally, suggesting the appropriateness of Supreme Court review, Judge Oakes predicted that the practical problems inherent in review by a district judge of the sterile record of a jury voir dire conducted outside his presence, or in reenacting a juror's interrogation, will lead to numerous difficult appeals "unless and until the Supreme Court decides the constitutional question." Id.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUIT COURTS OF APPEAL CONCERNING THE APPROPRIATENESS UNDER THE FEDERAL MAGISTRATES ACT, ARTICLE III, AND THE DUE PROCESS CLAUSE, OF DISTRICT COURT DELEGATION TO A NON-ARTICLE III MAGISTRATE OF THE CRITICAL FUNCTION OF JURY SELECTION IN A FELONY TRIAL

A. The Reach of the Federal Magistrates Act

In United States v. Ford, the Fifth Circuit prohibited district courts, even with the consent of the parties, from delegating supervision of jury selection in a federal felony trial to a magistrate. 824 F.2d at 1439 n.60. At the same time, the Second Circuit in Garcia sanctioned the practice in that circuit, even over a party's objection, thus aligning the Second Circuit with the Ninth and the First.[4] But even within the Second Circuit there is no uniformity: the practice is used in the Eastern, but not the Southern, District of New York. United States v. Garcia, 848 F.2d at 1338 (Oakes, C.J., dissenting). And those districts, like the Eastern, which permit the procedure, do so "without established rules for determining when voir dire should be assigned and without established procedures for review." Id. See, e.g., Local Rule 1 of the Eastern District's Rules for Magistrates, quoted at p. 4, supra.

The activist efforts of the lower courts to structure a constitutionally-adequate procedure for delegating jury selection to magistrates seek to fill a void left by Congress. The Federal Magistrates Act

4 United States v. Peacock, 761 F.2d 1313 (9th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 139 (1985); United States v. Bezold, 760 F.2d 999 (9th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 811 (1986); United States v. Rivera-Rola, 713 F.2d 866 (1st Cir. 1983) (dictum).

carefully delineates the civil and criminal contexts in which magistrates may exercise delegated authority and the procedures and standards for district court review. It specifies the contexts in which consent by the parties is required. But the act is silent as to whether jury selection in felony trials may be delegated, whether consent is required, whether district court review is available, the procedure for such review, and the standard of review to be applied.

While the Second Circuit in Garcia attributed little significance to this omission from the Congressional scheme, the Fifth Circuit saw the omission as purposeful: Congress did not contemplate that magistrates would conduct this critical, opening stage of a felony trial because it believed such a procedure would violate Article III. Ford, 824 F.2d at 1437. Thus, Ford noted that, in the extensive debate in Congress over the Magistrates Act of 1968,

> ... there was no suggestion that the Act authorized magistrates to conduct the trial of other than petty offenses. The implicit assumption was that magistrates presiding over the trial of felonies was not envisioned, to a certainty -- despite the presence of the additional duty language now said to allow magistrates to preside over jury selection in felony cases. [footnote omitted]

824 F.2d at 1432. Indeed, the assumption was more than "implicit": the bill's sponsor, Senator Tydings, when asked whether the legislation was intended to permit magistrates to try felonies, responded, "No. Absolutely not, but as I say, the Constitution and the laws of the United States preclude that." Hearings Before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. (March 7, 1968) at 88. See generally, TPO, Inc. v. McMillen, 460 F.2d 348, 352-59 (7th Cir. 1972)(extensive

discussion of legislative history behind Congress's insistence upon consent for magistrates to conduct misdemeanor and civil trials).

In Mingo v. Wedding, 418 U.S. 461 (1974), this Court held that the "additional duty" language did not authorize magistrates to conduct evidentiary hearings in federal habeas corpus cases where the legislative history did not reflect any Congressional intent to overrule the Habeas Corpus Act's requirement that such hearings be conducted by the district judge. Mingo's holding makes "plain that 'additional duty' has never been seen as a primary grant of power." United States v. Ford, 824 F.2d at 1432. "[S]uch a broad reading of congressional purpose would render superfluous the balance of the statute ... Additional duty is a residuum, granting the power to delegate any task not otherwise forbidden after we carve away that congery of duties that Congress never envisioned would be delegated." Id. at 1438.

In response to Mingo, Congress amended the Magistrates Act in 1976 to clarify the specific delegable functions, including presiding at habeas corpus hearings, that magistrates may serve, as well as the procedures and standards for district court review. While placing it in a separate subsection, Congress retained the identical "additional duty" language "without mentioning either the mechanics or the standard for review by a judge of any additional duty assigned to a magistrate [footnote omitted]." United States v. Ford, 824 F.2d at 1434; 28 U.S.C. § 636(b)(3).

Citing a portion of the legislative history, the Second Circuit concluded that the 1976 amendment was intended to permit the district courts to "'remain free to experiment in the assignment of other duties to magistrates

which may not necessarily be included in the broad category of "pretrial matters".'" United States v. Garcia, 848 F.2d at 1329, quoting H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172 [hereafter "House Report"]. But the court omitted the House Report's additional explanation that Congress's purpose was to make "increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties (emphasis added)." House Report, supra. Relying upon this additional insight into the legislative intent, the Fifth Circuit, contrary to the Second, concluded that Congress did not intend to relieve district judges of their "traditional adjudicatory dut[y]" to conduct jury voir dire at a felony trial. United States v. Ford, 824 F.2d at 1435-39.

At the core of the circuit courts' dispute lies a fundamental disagreement about the voir dire's constitutional significance to the trial. While paying lip service to "the importance of jury selection in the context of a trial," the Second Circuit nevertheless concluded: "[E]ven if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for the purposes of Article III trial begins with jury selection." United States v. Garcia, 848 F.2d at 1332. Satisfied that the "availability of de novo review" of unsuccessful "cause" challenges sufficiently safeguarded petitioners' constitutional rights, the court denigrated as an unproven "hypothesis" petitioners' concern that an Article III judge's absence was "somehow demeaning to

potential jurors." Id.§

The Fifth Circuit majority, however, sees the Supreme Court's voir dire-related decisions as "plainly reject[ing] the view that jury selection is a preliminary and essentially ministerial act." United States v. Ford, 824 F.2d at 1435. The Court has "noted the 'long and widely held belief that peremptory challenge is a necessary part of trial by jury.' [Swain v. Alabama, 380 U.S. 202, 219 (1965)]." Id. It has attempted to safeguard this process against a prosecutor's racially discriminatory exercise of peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 88-89 (1986). It has recognized the process as so fundamental to a fair trial that the defendant's Sixth Amendment right to counsel attaches, Brewer v. Williams, 430 U.S. 387, 399 (1977), as does the defendant's right to be present, Lewis v. United States, 146 U.S. 370, 376 (1892), and the public's First Amendment interest in an open trial, Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). See, e.g., discussion in United States v. Garcia, 848 F.2d at 1337 (Oakes, C.J., dissenting); United States v. Ford, 824 F.2d at 1435-36 and nn.34-40; Government of the Virgin Islands v. Gereau, 680 F.2d 13, 15 (1st Cir. 1982); F.R.Cr.P. 43(a) ("defendant shall be present ... at every stage of the trial including (emphasis added) the impanelling of the jury").

Thus, the Fifth Circuit's concern about delegating

§ The First Circuit's dictum that magistrates may conduct jury voir dire over the defendant's objection stressed that, in contrast to the voir dire, "preliminary ... jury instructions play an important part in the trial of any case. The jury should not be given the impression that the instructions given it are merely a routine matter of form." United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983). The court's admonition that district judges give preliminary instructions while delegating voir dire reveals its view that the voir dire itself is "routine." In petitioners' case, and in Ford, 824 F.2d at 1437, the magistrate conducted voir dire and gave preliminary instructions.

jury selection to magistrates, even with de novo review of cause challenges, goes far beyond hypothesizing, as the Second Circuit puts it, that jurors will feel "demeaned." The district judge conducting de novo review necessarily will defer to the magistrate due to the "unique importance of sight and sound in the nigh intuitive judgments" of the officer conducting voir dire. United States v. Ford, 824 F.2d at 1436-37, citing Wainwright v. Witt, 469 U.S. 412 (1985). Thus, "de novo review would be difficult and often impossible." Id. at 1437. Accord, United States v. Garcia, 848 F.2d at 1337-38 (Oakes, C.J., dissenting) (quoted at pp. 8-9, supra). Similarly, "a second voir dire or rehearing of testimony [might] never capture the original scene, and carrying a challenged venireman to a second interrogation before the district judge would be a delicate exercise at best [footnote omitted]." Ford, 824 F.2d at 1437.

Ford concluded:

> The trial lawyer knows that who decides the truth from the evidence may be as important as the evidence. The process of selecting the persons to hear the evidence inevitably introduces the trial players to the jury and itself triggers the decisional process. We have secured the rights to the selection process as an essential part of trial by jury and struggled to eliminate bias in its function.
>
> It is then difficult to view jury selection as fit for delegation to magistrates as part of a congressional effort to free judges for performance of their "traditional adjudicatory duty." Rather, we see jury selection as such an integral component of trial that we are not persuaded that Congress envisioned its delegation to magistrates.

824 F.2d at 1437-38.

In view of the conflict in the circuits concerning the reach of the Magistrates Act, the lack of uniform procedures, the issue's importance to the administration of

justice, and the Solicitor General's agreement in Ford that the issue is appropriate for Supreme Court review, the petition for certiorari should be granted.

B. The Constitutional Question

Intertwined with the statutory issue discussed above is the constitutional question whether magistrate-conducted voir dire violates a criminal defendant's Article III and due process rights.[6] Although the Fifth Circuit avoided reaching this issue in Ford, it recognized the presence of "grave constitutional issues." 824 F.2d at 1435. Accord, United States v. Garcia, 848 F.2d at 1337 (Oakes, C.J., dissenting) ("serious constitutional issues").

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court held the Bankruptcy Act of 1978 unconstitutional for creating non-Article III tribunals staffed by judges without life tenure or protection under Article III's Compensation Clause, even

6 Although Vallejo's counsel declined to object in the district court to the delegation of voir dire to the magistrate, it is by no means clear, as Justice White has observed, that such a "waiver" "can be dismissed under the plain error doctrine." See p. 7, supra. Parties cannot by consent confer on a tribunal "subject matter jurisdiction beyond the limitations imposed by Article III, § 2." Commodity Futures Trading Commission v. Schor, ___ U.S. ___, ___, 106 S.Ct. 3245, 3257 (1986), citing United States v. Griffin, 303 U.S. 226, 229 (1938). Elsewhere the Magistrates Act reflected congressional concern that "consent" might be coerced and required that such consent be "clear and unambiguous." Archie v. Christian, 768 F.2d 726, 728 (5th Cir. 1985); Horton v. State Street Bank & Trust Co., 590 F.2d 403, 404 (1st Cir. 1979); 28 U.S.C. § 636(c)(2)("neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent..."). "[T]he pressures to acquiesce," Horton, supra, are especially intense for a criminal defendant who faces the prospect of sentencing before the judge who is requesting his consent. This Court might well require a far more rigorous waiver of a defendant's Article III and due process rights than the simple statement by his counsel of "[n]o objection" as occurred in Vallejo's case. See, e.g., Boykin v. Alabama, 395 U.S. 238 (1969); F.R.Cr.P. 11(c)(1).

though the determinations of these tribunals were reviewable on appeal by the circuit courts. On the other hand, the Court recently upheld the consent jurisdiction of the Commodity Futures Trading Commission (CFTC) to adjudicate state law counterclaims in reparation proceedings, Commodity Futures Trading Commission v. Schor, ___ U.S. ___, 106 S.Ct. 3245 (1986), the procedure in the Magistrates Act for delegating to magistrates pre-trial suppression hearings subject to the district court's de novo review, United States v. Raddatz, 447 U.S. 667 (1980), and Congress's establishment of non-Article III courts in the District of Columbia, Palmore v. United States, 411 U.S. 389 (1973).

Article III, § 1, "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States ..." Schor, ___ U.S. at ___, 106 S.Ct. at 3257. Criminal trials are at the "protected core" of this power. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. at 70 n.25. The Raddatz majority was satisfied that a de novo review procedure carefully crafted by Congress with Article III and due process concerns in mind satisfied the constitutional requirement. But it by no means follows that a similar approach, adopted ad hoc by an activist judiciary to fill a statutory void, suffices in the jury voir dire context. "[T]he issues at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself." Raddatz, 447 U.S. at 679.

As the Fifth Circuit concluded, contrary to the Second, jury selection is the opening, and a critically important, stage of the criminal trial. Thus, contrary to the pre-trial suppression hearing, jury selection lies well within Article III's "protected core." The voir dire process is far more delicate and subtle than a suppression

hearing, and therefore far less susceptible to review by a non-participant. See discussion at pp. 8, 13-15, supra. An unsuccessful defendant remains free to argue at trial that the jury should disregard, or the district judge should reconsider whether to exclude, a confession or other evidence that a magistrate, subject to de novo review, has refused to suppress. Raddatz, 447 U.S. at 678 and nn.5-6. But the same defendant must live with the verdict of a jury whose selection the magistrate has supervised and effectively determined. Ford, 824 F.2d at 1437.

An additional danger in the Second Circuit's resolution against petitioners of these constitutional issues is that the court's holding "provides no limiting principle." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. at 73. If de novo district court review of magistrate-conducted jury selection satisfies Article III and the Due Process Clause, then so would such review of a magistrate's evidentiary and legal rulings or other conduct during the remainder of the trial. Garcia's rejection of a consent requirement does away even with that "constraint against the wholesale delegation of judicial power to adjuncts of the district court" which the same court saw as important, in a civil context, to "ensure that the delegation will not reach a magnitude that would trigger Article III concerns." Collins v. Foreman, 729 F.2d 108, 119 (2d Cir.), cert. denied, 469 U.S. 870 (1984); 28 U.S.C. § 636(c).

CONCLUSION

For the foregoing reasons, petitioners' motions to proceed in forma pauperis, and this petition for certiorari, should be granted.

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APPENDIX

without due process, we have little doubt that the Lupinacci evidence would have been admissible. Connecticut law does not appear to be to the contrary, see *State v. Bryant*, 202 Conn. 670, 688, 522 A.2d 451, 458 (1987) (assuming relevance, "[i]t is always competent for a [defendant] to [present] evidence tending to show that another committed the crime [with] which he is charged") (brackets in original; quoting other Connecticut cases); and state law could not, in any event, diminish Miller's federal constitutional rights.

CONCLUSION

For the reasons above, we conclude that Miller's claim under *Brady v. Maryland* has merit. Accordingly, we reverse the judgment of the district court dismissing Miller's petition and remand for entry of a judgment conditionally granting the writ. The judgment should provide that the writ will be granted unless within a reasonable time the State brings Miller to trial.

UNITED STATES of America, Appellee,

v.

Jose Dauary GARCIA, Damaris Sanchez, William Salazar, Pablo Porras, Diego Chaves-Twiens, Adela Gomez, Reimar Vallejo, Jose Gomez, Jaime Newbold, Yolanda Martinez, Hugo Shanks-Carrera, Defendants,

Diego Chaves-Twiens, Reimar Vallejo, Jose Gomez, Hugo Shanks-Carrera, William Salazar, Defendants-Appellants.

Nos. 238 to 242, Dockets 87-1243 to 87-1246 and 87-1264.

United States Court of Appeals, Second Circuit.

Argued Oct. 19, 1987.

Decided June 1, 1988.

Defendants were convicted in the United States District Court for the Eastern District of New York, Joseph M. McLaughlin, J., of various narcotics-related offenses, and they appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) magistrate could preside over jury selection process in felony prosecution over defendants' objections; (2) refusal to sever was proper; and (3) there was sufficient evidence to support convictions.

Affirmed.

Oakes, Circuit Judge, dissented and filed opinion.

1. United States Magistrates ⇐13

Jury selection delegation by federal district court to magistrate did not violate statute allowing delegation of pretrial matters to magistrates. 28 U.S.C.A. § 636(b).

2. Constitutional Law ⇐78

Statute permitting federal district courts to submit pretrial matters to magistrates did not violate separation of powers doctrine; federal district court judges had discretion in deciding whether to appoint magistrate to preside over jury selection, and de novo review by federal district judge was available regarding composition of jury. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Constitutional Law ⇐78

Federal district court's delegation of task of jury selection in felony prosecution to magistrate over defendants' objections did not violate Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Conspiracy ⇐43(12)

Facts that indictment charged defendant with several drug-related conspiracies and that evidence at trial proved only single conspiracy did not fatally impair defendant's trial.

5. Criminal Law ⇐622.2(1)

Defendants charged with various narcotics-related offenses were not entitled to severance, where all counts in indictment

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concerning non-RICO defendants were charged in RICO count as predicate racketeering acts against other defendants. Fed.Rules Cr.Proc.Rule 8(a), 18 U.S.C.A.

4. Criminal Law ⇐[illegible]

Defendant charged with narcotics racketeering and other drug-related offenses was not entitled to severance due to admission of evidence relating to parties charged in indictment, but who were not tried; evidence was admitted to show breadth of enterprise that formed basis for RICO count and to show defendant's knowledge and intent. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

7. Criminal Law ⇐622.2(1)

Different degrees of guilt or notoriety among defendants do not mandate separate trials.

6. Criminal Law ⇐622.2(1)

Defendant charged with possession of cocaine with intent to distribute was not entitled to severance of his trial from trials of defendants charged with conspiracy to distribute cocaine and with conducting narcotics racketeering enterprise, given straightforward nature of proof, similarity of charged offenses, and relatively small number of defendants. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

9. Criminal Law ⇐673(1)

Timing of giving of limiting instruction when physical evidence is admitted for limited purpose is best left to trial court's discretion. Fed.Rules Evid.Rule 105, 28 U.S.C.A.

10. Criminal Law ⇐673(1)

In joint trial for narcotics-related offenses, trial judge's failure to give limiting instructions contemporaneously with admission of each piece of physical evidence did not unfairly prejudice defendant; judge gave limiting instruction in his general charge, and contemporaneous limiting instructions upon admission of co-conspirator statements. F.R.A.P.Rule 105, 28 U.S.C.A.

11. Criminal Law ⇐469

Expert testimony concerning recorded coded telephone conversations between defendants charged with narcotics-related offenses was admissible, where expert simply testified as to jargon of drug trade, and did not interpret or draw conclusions from evidence.

12. Commerce ⇐82.10
Conspiracy ⇐47(12)
Drugs and Narcotics ⇐122(2)

Conviction for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine was supported by evidence that defendant matched physical description of codefendant's partner, defendant was looking for cocaine, and codefendant made telephone calls to defendant as transaction for sale of 50 kilograms of cocaine approached accomplice.

13. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐122(2)

Conviction for conspiracy to possess cocaine with intent to distribute and possession with intent to distribute was supported by evidence that codefendant delivered cocaine in defendant's presence, defendant delivered small amount of cocaine to co-conspirator, and defendant had beeper, $2,000 in cash, and small amount of drugs and drug paraphernalia on his person when he was arrested.

14. Drugs and Narcotics ⇐122(2)

Conviction for possession of cocaine with intent to distribute was supported by evidence that defendant delivered ten kilograms of cocaine.

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Bert H. Nisonoff, Forest Hills, N.Y., for defendant-appellant Hugo Shanks-Carrera.

Jerald Levine, Jackson Heights, N.Y., for defendant-appellant Diego Chavez-Tesina.

Harry C. Batchelder, Jr., New York City, for defendant-appellant William Salazar.

Sean F. O'Shea, Asst. U.S. Atty., Brooklyn, N.Y. (Andrew J. Maloney, U.S. Atty.,

E.D.N.Y.; John Gleeson and Emily Berger, Asst. U.S. Attys., of counsel), for appellee U.S.

Before OAKES, CARDAMONE and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is entitled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chaves-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (MacLaughlin, J.) for narcotics-related offenses.

FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Colombian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered Chaves-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chaves-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine—the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper

after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar—and verifying that that transaction involved cocaine—as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts of the indictment, the broadest of which alleged that Salazar and Chaves-Tesina conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chaves-Tesina, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chaves-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed.R.Crim.P. 8(b), 12(b), and 14. After jury selection—presided over by a magistrate—trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chaves-Tesina for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrera was acquitted on the conspiracy charge. This appeal followed. We affirm.

DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate—rather than a district court judge—may preside during jury selection:

1 *Jury Selection by a Magistrate*

Judge MacLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636."). Salazar, Chaves-Tesina, and Gomez objected to the delegation at the beginning of *voir dire* and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants *de novo* review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent, appellants declined the offer. There is no claim of prejudice from the delegation of the *voir dire* to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defend-

ant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

A. Statutory Provisions

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. *See, e.g., Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1] provides that a magistrate may hear and determine pretrial matters—with certain enumerated exceptions—subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2] a magistrate may conduct hearings on specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to *de novo* determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in *United States v. DeFiore*, 720 F.2d 757, 765 (3d Cir.1983), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury selection in felony cases. *Haith v. United States*, 342 F.2d 158, 159 (3d Cir. 1965) (*per curiam*) (failure to object to or claim prejudice from delegation waives right to contest delegation), *aff'g* 221 F.Supp. 495 (E.D.Pa.1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may—consistent with both § 636 and the Constitution—preside over jury selection despite the defendant's objection so long as *de novo* review is available in the district court. *See United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir.), *cert. denied*, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985); *United States v. Bezold*, 760 F.2d 999, 1002 (9th Cir.1985),

1. Section 636(b)(1)(A) provides:
(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
28 U.S.C. § 636(b)(1)(A) (1982).

2. Section 636(b)(1)(B) provides:
(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that
[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.
Id. § 636(b)(1).

cert. denied, 474 U.S. 1063, 106 S.Ct. 811, 88 L.Ed.2d 786 (1986); *see also United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir.1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting *en banc* determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. *See United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

[t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that *it is not restricted in any way by any other specific grant of authority to magistrates.*

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

1976 House Report, *supra*, at 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); *see also* S.Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selection, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment *beyond* duties traditionally categorized as "pretrial." Hence, even assuming *arguendo* that jury selection falls on the "trial" side of the line between "trial" and "pretrial"—a line that is, at best, often blurred—the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(2) (1982), and jury or nonjury civil trials, *id.* § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases *without* consent of the parties. Yet conditioning the holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

[1] We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. *E.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 3252, 92 L.Ed.2d 675 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Id.* Here, the legislative will is evident. As the Seventh Circuit stated, "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340-41 (7th Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979); *see also Ford*, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on

§ 636(b)(3) is Constitution or conflicting law).

B. Constitutional Concerns

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are two aspects to the separation of powers doctrine—a cornerstone of our federal constitutional structure—that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. *See Schor*, 106 S.Ct. at 3256; *Peacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc) (noting dual components of separation of powers cases), *cert. denied*, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984).

1. *Relationships Between the Three Branches*

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. *Schor*, 106 S.Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be ... blended as to give to each a constitutional control over the others, the degree of separation ... essential to a free government, can never ... be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances—an integral component of the constitutional structure—which serves to prevent each branch from encroaching on the power of the other. *The Federalist*, *supra*, No. 51, at 321-22 (J. Madison).

With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4257; *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for "'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the

Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government....'" *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 3193-94, 92 L.Ed.2d 583 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 2780, 77 L.Ed.2d 317 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,'" *Schor*, 106 S.Ct. at 3256 (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3336, 87 L.Ed.2d 409 (1985)), we examine the effect of such a delegation. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, *id.* § 631(b), and decide what matters are assigned magistrates, *id.* § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the decision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's *encroaching* upon the power of another. *Cf. United States v. Raddatz*, 447 U.S. 667, 682-83, 100 S.Ct. 2406, 2415-16, 65 L.Ed.2d 424 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. *See Raddatz*, 447 U.S. at 681-84, 100 S.Ct. at 2415-17 (upholding suppression hearing referred to magistrate with review); *Mathews v. Weber*, 423 U.S. 261, 271-72, 96 S.Ct. 549, 554-55, 46 L.Ed.2d 483 (1976) (upholding social security benefit cases referred to magistrate with review); *see also Ford*, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir.1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981) (same). So long as the "'essential attributes' of judicial power are retained in the Art. III Court," *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81, 102 S.Ct. 2858, 2876, 73 L.Ed.2d 598 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.

The availability of *de novo* review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In *Raddatz*, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684, 100 S.Ct. at 2414-15, 2416. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, *id.* at 681, 100 S.Ct. at 2415, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," *id.* at 683, 100 S.Ct. at 2416. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors." *Id.* at 686, 100 S.Ct. at 2417 (Blackmun, J., concurring); *see also Northern Pipeline*, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing *Raddatz*); *Mathews*, 432 U.S. at 271, 96 S.Ct. at 554 (final decision remains with judge); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv.L.Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court

will always satisfy the requirements of article III").

[2] Similarly, the trial judge here was "waiting in the wings" and offered *de novo* review, which the appellants declined. Nor do appellants claim that *de novo* review would have been ineffective. *Raddatz* compels the conclusion that neither delegation of *voir dire* per se nor delegation under the facts of this case erodes the power and independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. *Article III Rights*

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." *Schor*, 106 S.Ct. at 3256 (quoting *United States v. Will*, 449 U.S. 200, 218, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. *E.g., Schor*, 106 S.Ct. at 3256–67; *Peacemaker Diagnostic*, 725 F.2d at 541–42. Here, appellants affirmatively objected to the delegation of *voir dire* to a magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III, *cf. Schor*, 106 S.Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

[3] Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magistrate. While not minimizing the importance of jury selection in the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during *voir dire* or to hear challenges for cause. *See Ford*, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, *see, e.g., Lewis v. United States*, 146 U.S. 370, 373–74, 13 S.Ct. 136, 137–38, 36 L.Ed. 1011 (1892), or on when a trial begins for purposes of the Speedy Trial Act, *see, e.g., United States v. A-A-A Elec. Co.*, 788 F.2d 242, 246 (4th Cir.1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional protections attach can vary with the individual right involved. *Cf. Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501, 509 n. 3, 104 S.Ct. 819, 823 n. 3, 78 L.Ed.2d 629 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of *de novo* review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts to delegate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the

Constitution where, as here, the district court affords *de novo* review of unsustained challenges to jurors for cause.

II *Single or Multiple Conspiracy*

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indicting for single versus multiple conspiracies arises frequently in criminal jurisprudence. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); *United States v. Nersesian*, 824 F.2d 1294, 1302–03 (2d Cir.) (evidence properly supported single conspiracy charge), *cert. denied*, — U.S. —, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Miley*, 513 F.2d 1191, 1205–07 (2d Cir.), *cert. denied*, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975); *United States v. Borelli*, 336 F.2d 376, 378 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies—a recurring problem on appeal—Salazar contends that the reverse situation fatally impaired his trial.

[4] We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." *Miley*, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspiracy, we would be hard pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. *Cf. Nersesian*, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected," *United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stone-faced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules governing joinder and severance still apply.

III *Joinder and Severance*

[5] Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tezina. Joinder of these defendants in the same indictment was therefore proper under Fed.R.Crim.P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. *See United States v. Burton*, 647 F.2d 234, 239–40 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980); *United States v. Gallo*, 668 F.Supp. 736, 748 (E.D.N.Y.1987), *mandamus granted on other grounds*, 834 F.2d 283 (2d Cir.1987); *United States v. Castellano*, 610 F.Supp. 1359, 1396–97 (S.D.N.Y.1985). The only question is whether denial of the Fed.R.Crim.P. 14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. *Nersesian*, 824 F.2d at 1303.

A. Salazar

[6] The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not

be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a *severance* argument—as appellant contends—but rather a *relevance* argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. *See United States v. Rodolfo*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923, 106 S.Ct. 253, 88 L.Ed.2d 264 (1985). Hence, the denial of the severance motion must stand.

B. Shanks-Carrera

[7] Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do not mandate separate trials. *Nersesian*, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. *See, e.g., Weisman*, 624 F.2d at 1130.

[8] In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir.1984), *cert. denied*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

C. Vallejo and Gomez

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

IV *Evidentiary Issues*

A. Rule 105 Limiting Instructions

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's and Gomez's requests that limiting instructions be given contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when coconspirator statements were admissible against some—but not all—defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.
>
> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed.R.Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, *see* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065 (1977 & Supp.1987),

the weight of authority is to the contrary. *See United States v. Carson*, 702 F.2d 351, 363 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), *cert. denied*, 462 U.S. 1108, 103 S.Ct. 2457, 77 L.Ed.2d 1335 (1983); *United States v. Losada*, 674 F.2d 167, 171–72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982); *see also* 1 J. Weinstein, *Weinstein's Evidence* ¶ 105[05], at 105–44 (1988) ("The jury may be instructed either as the [limited] evidence is admitted *or as part of the general charge.*") (emphasis added; footnote omitted).

[9] The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. *See United States v. Oxford*, 735 F.2d 276, 280 (7th Cir.1984); *United States v. Dubish*, 708 F.2d 240, 243 (6th Cir.1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. *See Losada*, 674 F.2d at 171–72 (looking for prejudice); *Weisman*, 624 F.2d at 1130 (same); *United States v. Toliver*, 541 F.2d 958, 963 (2d Cir.1976) (same).

[10] We conclude that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting instructions upon the admission of coconspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. *See United States v. Tettler*, 802 F.2d 606, 617 (2d Cir.1986). Further, the evidence admitted without contemporaneous instructions was physical evidence that lent itself to compartmentalized consideration. *See, e.g., Toliver*, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

B. DEA Expert Testimony

[11] Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. *See Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400–01 (2d Cir.1985), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1788, 90 L.Ed.2d 339 (1986); *United States v. Young*, 745 F.2d 733, 760–61 (2d Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

C. Sufficiency of the Evidence

Chavez-Tosino, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. *Losada*, 674 F.2d at 172. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir.1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and all permissible inferences construed in its favor. *United States v. Dazzo*, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 77 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal in-

OAKES, Circuit Judge (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of permitting magistrates to conduct jury voir dire in felony cases raises serious constitutional questions. *See United States v. Ford*, 824 F.2d 1430 (5th Cir.1987) (en banc), *cert. denied*, — U.S. —, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." *Id.* at 1435 (quoting *Gray v. Mississippi*, — U.S. —, 107 S.Ct. 2045, 2056, 95 L.Ed.2d 622 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 88–89, 106 S.Ct. 1712, 1718–19, 90 L.Ed.2d 69 (1986). And, while double jeopardy does not attach until the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160, 57 L.Ed.2d 24 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, *accord* Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (1982 & Supp. IV 1986), to be present while a jury is selected, *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed.2d 1011 (1892); *United States v. Crutcher*, 405 F.2d 239, 242–43 (2d Cir. 1968), *cert. denied*, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Fed.R.Crim.P. 43(a), and to the assistance of counsel during jury selection, *see Brewer v. Williams*, 430 U.S. 387, 399, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in *United States v. Ford*, 824 F.2d at 1436–37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. *See United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. *See United States v. Ford*, 824 F.2d at 1437; *but see id.* at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forthcoming unless and until the Supreme Court decides the constitutional question.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever

watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. at 217, 102 S.Ct. at 946. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel shortchanged, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I cannot think that the practice—at least in a jurisdiction such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire—is one that can save much judicial time. It is a practice that is not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.

Shirley WILDER, et al.,
Plaintiffs-Appellees,

v.

Blanche BERNSTEIN, Individually and as Administrator of the New York City Human Resources Administration, et al., Defendants-Appellees,

Abbott House, et al.,
Intervenors-Appellees,

Paula Rabinow, Individually and as Director of the Joint Planning Service, et al., Appellants.

Nos. 1684, 1685 and 1686, Dockets 87-7685, 87-7688 and 87-7410.

United States Court of Appeals, Second Circuit.

Argued June 24, 1987.

Decided June 8, 1988.

Certified class of black Protestant children sued for declaratory and injunctive relief, arguing that city's statutory scheme for provision of child care services violated their establishment and free exercise rights, their rights to equal protection and due process, and Title VI of the Civil Rights Act. Settlement was proposed on behalf of plaintiff class and some foster care agencies objected. The United States District Court for the Southern District of New York, 645 F.Supp. 1292, Robert J. Ward, J., initially approved the settlement subject to compliance with conditions, and after final judgment ruling that conditions had been met, objecting foster care agencies, which had been dismissed as parties when settlement was approved, appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that settlement, providing for placement of children in foster care homes on first-come, first-served basis, did not violate New York's constitutional and statutory provisions for religious matching of child with child care services, did not infringe free exercise of religion rights of parents and children, and did not violate religious establishment clause.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty- eight

UNITED STATES OF AMERICA,
Appellee,

-v.-

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,
Defendants,
DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
AUG 4 1988
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Docket Nos 87-1243, 87-1244, 87-1245, 87-1246, 87-1264

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants WILLIAM SALAZAR, HUGO SCHANKS-CARRERA, and JOSE GOMEZ.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

86 CR 266

Plaintiff,

-against-

JOSE GOMEZ, ET AL.,

Defendants.

----------x

U.S. Courthouse
Brooklyn, N.Y.

February 9, 1987

JURY SELECTION BEFORE A. SIMON CHREIN,
CHIEF MAGISTRATE

APPEARANCES:

FOR THE PLAINTIFF
SEAN O'SHEA, ESQ., AUSA

FOR DEFENDANT SALAZAR
HARRY BATCHELDER, ESQ.

FOR DEFENDANT TESINA
JERRY LEVINE, ESQ.

FOR DEFENDANT VALLEJO
FREDERICK MILLER, ESQ.

FOR DEFENDANT GOMEZ
PAUL WARBURGH, ESQ.

FOR DEFENDANT CARSERA
BURT NISINOFF

FRED LORBER, CSR
OFFICIAL COURT REPORTER
718 330 2168

THE COURT: Ready to start, gentlemen?

MR. O'SHEA: We are missing a chair.

THE COURT: Take a chair from another table. Is that a major logistical problem? Let me swear the interpreters. Are both interpreters here?

R. VAN NORMAN WHITFORD and JOSE A. MONTALDO, were duly sworn as interpreters by the Court.

THE COURT: Gentlemen, I understand that when the question was posed to some or all of the defendants as to whether or not they wished to consent to a Magistrate selecting the jury, with the understanding that the case would nonetheless be tried by an Article 3 Judge, that some defendants have objected to the procedure of a Magistrate jury selection. Is that correct?

MR. WARBURGH: That is my understanding, yes.

THE COURT: Do all of the defendants object, or just some?

MR. LEVINE: On behalf of my client, he objects to the jury selection before the Magistrate.

MR. BATCHELDER: On behalf of Mr. Salazar, Mr. Salazar objects, Your Honor.

THE COURT: Do any other defendants object to a Mag istrate selecting the jury?

MR. WARBURGH: I need an interpreter. Mr. Gomez objects.

THE COURT: Thatleaves me with just two additional--

MR. MILLER: Let's have a severance and we will try our own case.

THE COURT: I am not talking about a severance. Mr. Salazar has objected, is that correct, Mr. Batchelder?

MR. BATCHELDER: That is correct, sir.

THE COURT: Mr. Levine, Mr. Tesina has objected?

MR. LEVINE: I did that originally, Judge.

MR. MILLER: No objection.

THE COURT: Mr. Warburgh, your client has objected?

MR. WARBURGH: Mr. Gomez objected.

THE COURT: Mr. Nisinoff?

MR. NISINOFF: He has not objected, Your Honor.

THE COURT: Mr. O'Shea, what is the government's view as to whether we can proceed?

MR. O'SHEA: Your Honor, I believe the view that you espoused earlier in your own courtroom, that the selection of the jury by yourself, the Magistrate, is perfectly proper. The government's position is that we should proceed with the jury selection.

THE COURT: I intend to proceed with the selection. In the event Judge McLaughlin decides that he

would prefer to select the jury, either on his own initiative or at the request of any counsel, inasmuch as no juror will be sworn as a trial juror, they will, of course be sworn for the voir dire, there would be no jeopardy. There would be no prejudice and Judge McLaughlin would be free to discharge whatever jury we select today.

My own view of the matter is that the selection of the jury, even over the objection, or without the consent of the defendants has been approved in other matters within this Circuit.

Yes, Mr. Batchelder?

MR. BATCHELDER: Do I understand it that the Second Circuit has passed on the propriety of Magistrates over the objection, or whether--

THE COURT: No, they have approved the procedure, my understanding is.

MR. BATCHELDER: They have not, as I understand it, approved the procedure if the defedant wishes to, because the Magistrate Act has been construed narrowly not to confer that power, as I understand it.

THE COURT: Mr. Batchelder, what I have indicated I will do, unless both sides object, is to proceed to select the Jury and you can raise whatever objection to the panel selected and to the manner of its selection before Judge McLaughlin on the 17th when the trial begins.

If JUdge McLaughlin or in fact I would ask that you bring it to Judge McLaughlin's attention at the close of this selection process. If he chooses to select the jury by himself, then he is free to do so.

MR. BATCHELDER: Your Honor, I don't--

THE COURT: You have your exception.

MR. BATCHELDER: I realize I am as anxious as Your Honor to bring this matter to a conclusion, but in defense of my client's interests, Your Honor, I think it would be a brave person, Judge McLaughlin included, who after having wasted three, four hours of what we are doing here, to automatically say, no, I don't think Magistrate Chrein has the power, so therefore, we are going to go ahead.

I am submitting if my client objects to jurisdiction, as I understand the Magistrate Act, unless my client consents, and you do not have jurisdiction to do what we are about to embark on, and that is all the record I am making.

THE COURT: Does anybody feel that some inquiry should be posed to Judge McLaughlin now?

MR. MILLER: Judge--

THE COURT: I see no need for such an inquiry. I believe the matter has been dealt with. I don't think there was a specific central issue to any case, but jury selections by Magistrates have been approved in both this

Circuit and other Circuits. I unfortunately do not have the cases at my fingertips at this point.

MR. O'SHEA: I don't have the cases either, Your Honor. But I believe you are correct. I have no objection, however, if the Court wishes to inquire of Judge McLaughlin what he would like to do at this point. It is entirely up to the Court.

THE COURT: Mrs. Culman, can you get me Judge McLaughlin's law clerk on the phone?

THE CLERK: Yes, sir.

THE COURT: In fact, I am going into chambers and deal with it myself. Are they getting somebody? I will speak to him. They are coming in. Yes, Mr. Warburgh?

MR. WARBURGH: We have one interpreter in the Courtroom.

THE COURT: There is a machine.

MR. WARBURGH: Yes, I understand. There came a time here when I needed an interpreter to speak to my client briefly, privately, and he had to stop doing what he was doing to come over and aid me. I don't think it is important now during jury selection process.

THE COURT: Then I will make a note of that and we will tell the Judge. You can raise that with Eileen Levine before the trial. All right, I am going to proceed to select the Jury. Judge McLaughlin's view of the law was

the same as mine. Those parties that object, and we have recorded on the record who has objected and who has consented, that those parties who object are deemed to have an objection. I assume the ground is that jury selection being part of the trial, and a Magistrate not being permitted even with waiver to try a felony case, that this is a part of the trial and the parties insist that all aspects of the trial or those objecting parties insist that all aspects of the trial be conducted by an Article 3 Judge, your exception is noted and when the jury comes up we will proceed to pick the jury.

I would ask that any friends or relatives or spectators stay within the first two rows on the right side of the room. I intend to fill the remainder with prospective jurors. So if any of you have, if there are any spectators or people who are not prospective jurors, sit in the first row alone where the three people are seated now.

MR. NISINOFF: Stay right there.

THE COURT: Fill up my right side first. Are those two gentlemen deputy marshals?

A VOICE: Yes, sir.

THE COURT: Could you possibly position yourself over those two benches. I intend to use those benches for prospective jurors. There must be an extra chair or two thatyou can use. Have you phoned for the jurors yet?

Nos. 88-5014; 88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, DIEGO CHAVEZ-TESINA,
WILLIAM SALAZAR and BEIMAR VALLEJO, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

CERTIFICATE OF SERVICE

I, Joel B. Rudin, a member of the Bar of this Court, hereby certify that on the 30th day of September, 1988, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for respondent herein. I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

Nos. 88-5014 and 88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, 28 U.S.C. 631 et seq., permits a district court to delegate jury selection to a federal magistrate.

2. Whether a district court's delegation of jury selection to a federal magistrate violates Article III of the Constitution.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-5014

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-5158

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Supp. Pet. App. 1a-15a) is reported at 848 F.2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1988. A petition for rehearing was denied on August 4, 1988 (Supp. Pet. App. 16a). The petition for a writ of certiorari in No. 88-5014 was filed on July 5, 1988, and the petition for a writ of certiorari in No. 88-5158 was filed on July 22, 1988. A supplemental petition for a writ of certiorari in both cases was filed on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. (& Supp. IV) 841(a)(1), and conspiring to do the same, in violation of 21 U.S.C. 846. Petitioner Chavez-Tesina was also convicted of conducting a narcotics racketeering enterprise in violation of 18 U.S.C. 1962(c), and interstate travel in aid of racketeering, in violation of 18 U.S.C. (& Supp. IV) 1952. Petitioner Gomez was sentenced to a total of ten years' imprisonment and a ten-year special parole term. Petitioner Chavez-Tesina was sentenced to a total of 20 years' imprisonment and a lifetime term of special parole. The court of appeals affirmed (Supp. Pet. App. 1a-15a).

1. Prior to petitioners' trial, the district court assigned the task of jury selection to a magistrate pursuant to a local rule conferring upon magistrates the authority to discharge the duties set forth in the Federal Magistrates Act, 28 U.S.C. 631 et seq. Petitioners and a co-defendant objected to that delegation at the beginning of jury selection, and their co-defendant renewed his objection after the jury had been selected (Supp. Pet. App. 18a-19a). The district court upheld the delegation but offered petitioners and their co-defendant de novo review of any challenges to jurors for cause. Because the only juror challenged for cause was excused by consent, petitioners and their co-defendant had no occasion to request review by the district court. Id. at 4a.

2. The court of appeals affirmed (Supp. Pet. App. 1a-15a). The court concluded that, consistent with both the Federal Magistrates Act and the Constitution, a district court may delegate jury selection to a magistrate. The court found that Section 636(b)(3) of the Federal Magistrates Act, which allows district courts to assign magistrates "such additional duties as

are not inconsistent with the Constitution and laws of the United States," was broad enough to encompass the delegation of jury selection (Supp. Pet. App. 5a-6a). The court rejected petitioners' contention that Congress intended to allow magistrates to be assigned only pretrial matters (id. at 5a). The court also rejected petitioners' assertion that by requiring the parties' consent to the delegation of misdemeanors and civil trials to magistrates, Congress intended to allow the delegation of jury selection only with the parties' consent (ibid.).

The court of appeals next held that the delegation of jury selection to magistrates does not violate the Constitution (Supp. Pet. App. 7a-9a). According to the court, jury selection can be delegated to a non-Article III judge without violating Article III, because "the delegation of authority occurs entirely within the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch encroaching upon the power of another" (id. at 8a (emphasis in original; citation omitted)). The court also concluded that where, as in this case, an Article III judge retains the authority to review the magistrate's decision, delegation would not offend the Constitution even if jury selection were deemed "inherently judicial" and thus nondelegable (id. at 8a-9a). Finally, the court rejected petitioners' claim that Article III requires the presence of an Article III judge during jury selection (Supp. Pet. App. 9a-10a).

Judge Oakes dissented (Supp. Pet. App. 14a-15a). He concluded that jury selection by federal magistrates "raises serious constitutional questions" that are not adequately answered by permitting subsequent de novo review of jury challenges by the district court (id. at 14a). Judge Oakes also contended that the delegation of jury selection to magistrates is a bad practice because it distances the district judge presiding over the trial from the jury (id. at 14a-15a).

ARGUMENT

Petitioners contend that the delegation of jury selection to a magistrate violates the Federal Magistrates Act and the Constitution. They also argue that the decision of the court of appeals in this case conflicts with decisions of other courts of appeals and, accordingly, warrants this Court's review. We believe that the court of appeals correctly rejected petitioners' claims. Because, however, the decision of the court of appeals conflicts with a decision of another court of appeals and concerns a question of substantial importance to the federal criminal justice system, we agree that the petitions should be granted.

1. The Second Circuit's decision in this case conflicts with the Fifth Circuit's decision in United States v. Ford, 824 F.2d 1430 (1987) (en banc), cert. denied, No. 87-5570 (Jan. 19, 1988), 1/ in which the Fifth Circuit held that the Federal Magistrates Act does not authorize district courts to delegate jury selection to magistrates. The court concluded that a contrary construction "would pose grave constitutional issues" (id. at 1435). The court upheld the defendant's conviction in Ford only because the defendant had not objected to the delegation, and the claim was held not to amount to plain error. Four judges dissented from the statutory ruling on the ground that in their view jury selection by magistrates offended neither the Magistrates Act nor the Constitution (see id. at 1440 (Rubin, J., dissenting)).

The Second Circuit in this case disagreed with the Fifth

1/ In our opposition last Term to the petition for a writ of certiorari in Ford (No. 87-5570), a copy of which has been provided to petitioners, we advised the Court that the authority of magistrates to conduct jury voir dire proceedings in federal criminal cases is an important issue that would likely warrant the Court's review. We nonetheless opposed its review in that case because the petitioner had failed to preserve her claim in the district court and because no court had (or has) held that such a claim is cognizable under the plain error standard.

Circuit's holding in Ford and concluded that the Magistrates Act does permit the delegation of jury selection to a federal magistrate (see Supp. Pet. App. 5a-7a). The Ninth Circuit has likewise upheld a district court's delegation of jury selection to a magistrate, but only if the district court retains de novo review of the magistrate's decisions. See United States v. Peacock, 761 F.2d 1313, 1317-1319 (9th Cir.), cert. denied, 474 U.S. 847 (1985); United States v. Bezold, 760 F.2d 999, 1001-1003 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986); see also United States v. Rivera-Sola, 713 F.2d 866, 872-873 (1st Cir. 1983) (stating in dictum that the delegation of jury selection is lawful).

This case also presents a proper vehicle for reaching the lawfulness of the delegation of jury selection to a magistrate. In this case, unlike in Ford, petitioners timely objected to the delegation of jury selection (see Supp. Pet. App. 4a, 18a-19a). Consequently, the statutory and constitutional questions are not encumbered by the question whether the delegation amounts to plain error. In addition, the court of appeals has fully considered and addressed both the statutory and constitutional dimensions of jury selection by magistrates. 2/

2. Unlike petitioners, we believe that the court of appeals correctly determined that the Federal Magistrates Act authorizes the delegation of jury selection to magistrates and that Article III of the Constitution does not forbid that practice. The court of appeals' analysis is consistent with our general view and with

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2/ Although petitioner Chavez-Tesina's "questions presented" in his initial petition do not expressly raise the statutory issue separately from the constitutional issue (see 88-5158 Pet. (i)), the petition itself makes clear that he is raising both questions (see, e.g., id. at 12 ("Simply put, whatever the power of Congress may be, this Court must not be persuaded that Congress intended that 'additional duty' include presiding over jury selection in felony cases."). In addition, the supplemental petition for a writ of certiorari filed jointly by petitioners clearly raises both the statutory and constitutional questions (see Supp. Pet. (i)).

the views expressed by the dissenting judges in Ford and the Ninth Circuit in Bezold and Peacock.

First, we believe that the authority to conduct jury voir dire falls within the powers granted to magistrates in the Federal Magistrates Act, 28 U.S.C. 636. Section 636(b) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." Congress intended this broad grant of authority to "enable[] the district courts to continue innovative experimentation in the use of this judicial officer. * * * [P]lacing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates." S. Rep. 94-625, 94th Cong., 2d Sess. 10 (1976); see also H.R. Rep. 94-1609, 94th Cong., 2d Sess. 12 (1976).

Authority for magistrates to conduct voir dire can also be found in the provision of the Magistrates Act that states that "a [district] judge may designate a magistrate to hear and determine any pretrial matter pending before the court" (28 U.S.C. 636(b)(1)(A)). As the Senate Report explains, that provision was intended to authorize magistrates to perform the functions enumerated by Chief Judge Belloni of the District Court for the District of Oregon in his submission to the Senate committee. See S. Rep. 94-625, supra, at 7; H.R. Rep. 94-1609, supra, at 9. Significantly, Judge Belloni described to the Senate Judiciary Committee the functions performed by the magistrate in his district, including "presid[ing] over the voir dire and jury selection of a trial to begin momentarily before a [district judge]." Jurisdiction of United States Magistrates: Hearing on S. 1283 Before a Subcomm. of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 39 (1975).

Second, magistrate-conducted voir dire does not violate Article III of the Constitution. As the court of appeals

observed, "[t]he Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection" (Supp. Pet. App. 8a). Here, as in United States v. Raddatz, 447 U.S. 667 (1980), in which this Court rejected a similar constitutional challenge to the Magistrates Act, 3/ Article III was not offended because the magistrate's actions with respect to voir dire occurred "under the district court's total control and jurisdiction" (447 U.S. at 681). Indeed, the district court judge offered petitioners and their co-defendant de novo review of any challenges to jurors for cause that were not sustained by the magistrate. Petitioners, however, declined the offer because the magistrate did not deny any such challenge.

Petitioners' constitutional claim is presented therefore in its starkest form. They do not (and cannot) claim any concrete prejudice from the practice employed in this case. Instead, they must argue that the absence of an Article III judge at voir dire violates Article III even in the absence of any possibility of prejudice. As the court of appeals explained (Supp. Pet. App. 9a), however, an Article III judge need not preside over all facets of a federal criminal proceeding. See Palmore v. United States, 411 U.S. 389, 402 (1973) (citations omitted) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protection prescribed for federal judges in Art. III."); Swain v. Pressley, 430 U.S. 372, 382-383 (1977) (footnote omitted) ("[T]he Constitution does not require that all persons charged with federal crimes be tried in Art. III courts."). For example, an arrested person typically makes his initial

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3/ In Raddatz, the Court rejected a due process challenge to the provision of the Magistrates Act authorizing a district court both to refer to a magistrate a motion to suppress evidence and to rule on the motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations.

appearance before a magistrate (Fed. R. Crim. P. 5); a magistrate may determine various pretrial motions in criminal cases (28 U.S.C. 636(b)(1)(A)); and a magistrate may conduct hearings and make recommendations to a district court regarding other motions, such as motions to dismiss indictments and to suppress evidence (28 U.S.C. 636(b)(1)(B)). We believe that a magistrate's conducting of voir dire is likewise not precluded by Article III.

CONCLUSION

The petitions for a writ of certiorari should be granted and the cases consolidated for purposes of oral argument and disposition.

Respectfully submitted.

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Solicitor General

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NOVEMBER 1988

(5) (5)

Nos. 88-5014 and 88-5158

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

DIEGO CHAVEZ-TESINA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI (GOMEZ) FILED JULY 5, 1988
PETITION FOR CERTIORARI (CHAVEZ-TESINA) FILED JULY 22, 1988
CERTIORARI GRANTED JANUARY 9, 1989

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RELEVANT DOCKET ENTRIES IN *UNITED STATES v. GARCIA, DIEGO CHAVEZ-TESINA, JOSE GOMEZ, et al.*

District Court Proceedings

(Docket No. 86 Cr. 266(S) (JMM))

3/27/86	Magistrate complaint filed and arrest warrant issued and executed.
3/28/86	Defendants arraigned on complaint before Magistrate.
4/11/86	Indictment handed up and filed.
4/22/86	Defendants arraigned on the indictment.
7/ 7/86	Superseding indictment handed up and filed.
7/ 8/86	Defendants arraigned on superseding indictment.
11/20/86	Pre-Trial Conference before District Judge McLaughlin. Jury selection scheduled before a magistrate.
2/ 9/87	Jury selection held before Magistrate Chrein.
2/17/87	Jurors sworn and trial before District Judge McLaughlin begins.
2/28/87	Trial ends with jury verdict of guilty.
5/14/87	Judgment of Conviction and sentence entered.
5/14/87	Notices of Appeal filed.

Court of Appeals Proceedings

(Docket No. 87-1243-1246, 1264)

10/19/87	Oral argument of *United States v. Garcia, et al.*
6/ 1/88	Convictions affirmed.
8/ 4/88	Petition for rehearing denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

-against-

WILLIAM SALAZAR, *et al.*,
Defendant.

TRANSCRIPT OF JURY SELECTION
BEFORE THE
HONORABLE MAGISTRATE A. SIMON CHREIN
UNITED STATES DISTRICT JUDGE

February 9, 1987
10:00 A.M.

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[2] THE COURT: Are we all here now?
MR. O'SHEA: Yes.
THE COURT: All right, come up, come up, please. Just make yourselves comfortable in the chairs here.
All right, Mr. Batchelder, who do you represent?
MR. BATCHELDER: I represent William Salazar.
THE COURT: Okay. Mr. Salazar.
Let me just see. Okay. William Salazar.
All right, who do you represent, Mr. Levine?
MR. LEVINE: Dacina.
THE COURT: Diego Chavez Dacina.
MR. LEVINE: Right.
THE COURT: Who is Mr. Miller?
MR. MILLER: Frederick V. Miller.
I represent Marva Vallejo.

THE COURT: All right. I have the indictment in front of me.
All right, Mr. Wauberg, who do you represent?
MR. WAUBERG: Jose Gomez.
THE COURT: Jose Gomez.
And finally, Mr. Nisonoff, who do you represent?
MR. NISONOFF: Hugo Shanks Carera.
THE COURT: All right. I notice that a number of these two defendants appear to be charged with a RICO count. A number appear to be charged with a conspiracy count and the [3] balance in very substantive counts regarding cocaine; is that correct?
MR. O'SHEA: That's correct, Judge.
THE COURT: Okay. What I plan to do, obviously, the jury will be selected in Judge McLaughlin's courtroom. I want to go over the ground rules here.
The jurors are, of course, have to be told the nature of the charge.
I don't know if it would be helpful. Of course, I'll give the usual explanation concerning the fact that I know the indictment is not evidence and that no inference can be drawn against the defendant just because he is accused of a crime of indictment but rather than identify each defendant as the counts at this point, though I will go into my questioning of the jurors, their obligations.
Okay. What I was going to say is that I will, of course, question the jurors on their ability to give each defendant a separate trial that he or she is entitled to in the sense that I will tell them that some defendants are accused of some crimes with others, with other crimes, they will have the obligation if they find that one juror, one defendant may have been proven guilty of one crime, they still have the obligation not to sweep everybody along with the tide. But I thought it might be helpful if I just indicated that certain defendants are charged with the crime of engaging in the [4] enterprise that carried on a pattern of racketeering activity.

These are the words I will use and I will indicate that Judge McLaughlin will explain to them in the charge in greater length, some of the defendants are engaged in the pattern of racketeering activity and that they participated or conducted an enterprise whose goal it was to distribute narcotics. Cocaine, specifically.

I'll indicate that the other defendants are accused of other facts, similarly accused of forming a criminal conspiracy. That is an agreement between two or more people to commit, to commit an unlawful act relating to the possession and distribution of cocaine.

I'll indicate that each of the defendants are charged with the possession, or possession with intent to distribute cocaine.

Does anybody object to that overall summary?

MR. NISONOFF: Not that I am objecting.

May I ask you a question, Judge.

Is it your intention not to identify who was indicted on the RICO counts?

THE COURT: If you want I'll identify the RICO conspiracy counts, but I don't want to read each count. I don't see how it adds anything into the picking of the jury. The jury is to determine which jurors would be prejudiced, constitute the existence of a narcotic charge and as long [5] as the jury knows the nature of the charge they will have to address it and it doesn't really matter how much charges they have to address.

I'll indicate a number of charges.

MR. NISONOFF: I'm a little concerned. My client is not accused of the RICO charges.

THE COURT: All right. Let's do it this way, Mr. Salazar.

MR. BATCHELDER: A RICO conspiracy to RICO, I think another conspiracy and two substantive counts.

THE COURT: RICO conspiracy. I'm going just to, if after, say conspiracy.

MR. BATCHELER: I would appreciate that.

THE COURT: And substantive counts.

MR. BATCHELDER: Could you explain to the jury what substantive counts are?

THE COURT: I will not. The substantive. I'm saying he is charged with a number of counts in evidence of guilt, possession of cocaine and possessing with the intent to distribute cocaine.

Are there distribution counts?

MR. O'SHEA: Yes.

MR. BATCHELDER: Two.

THE COURT: Okay. Mr. Dacina is charged with what?

MR. LEVINE: RICO conspiracy and substantive counts.

[6] THE COURT: Is there anyone who is charged with only one substantive count?

MR. MILLER: Mine.

MR. O'SHEA: I think that's right with Gomez, your Honor, charged conspiracy count, one substantive count, the possession.

Shanks is charged with conspiracy and substantive counts.

THE COURT: All right.

Vallejo is charged with what?

MR. MILLER: Conspiracy count, that's all.

MR. O'SHEA: Subsantive count.

MR. MILLER: A substantive count. Thats it.

THE COURT: Then that leaves me with Carera, conspiracy and substantive.

The only one charged with RICO is Salazar, Dacina. You have a conspiracy and substantive?

MR. NISONOFF: Yes.

THE COURT: Do you gentlemen prefer a struck jury or to use a series of rounds?

MR. O'SHEA: Struck.

THE COURT: Let me do this. Does anybody have any questions as to what a struck jury is.

Mr. Levine, just pay attention to me.

MR. LEVINE: I'm sorry, Judge.

[7] THE COURT: Anybody have any questions as to what struck system we use?

MR. BATCHELDER: I do, sir.

THE COURT: Let me just tell you what I plan to do.

Allowing for the fact five of you, with divergent issues, I am going to allow the defendants, collectively, fourteen challenges. Those fourteen can be, if I use a struck jury, will allow you to get prime jurors and alternates.

I'm going to allow the government seven challenges between regular jurors and alternates. How you divide among yourselves the fourteen challenges I discussed is entirely between yourselves.

I do feel that my giving you three more challenges than you would normally have collectively and restrict the government to seven, the six for regular jury, the one for the alternates I have compensated for any possible conflict that there might be between you.

In connection with the jury selection what I will do, therefore, in empanelling 36 jurors in order. I will have three alternates, because I understand the trial will go at least a week, I will have a minimum. It doesn't start for a week.

I understand that, hopefully, they will all rest and be ready to contend with you gentlemen.

I will have 36 jurors seated in order. I will conduct [8] the voir dire as to each juror. Before any preemptory challenge shall be exercised if any juror, and in time inputations, I suspect there might be some time jurors will be excused for cause. If any jurors are excused for cause. I will immediately put another juror in the place of that juror who has been excused for cause before you have to consider your preemptory challenges, so that you will have an array of 36 jurors after voir dire from whom to exercise the preemptory challenges.

The preemptory challenges will be exercised in one submission, but I will alternate in that in the first six

rounds the defendants will have two challenges, they will be rounds, though there will be no intervening of questioning of the jurors on the first six rounds the government will have one challenge each will in fact each of the seven rounds that I will use the government will have one challenge.

The defendants, too. They will alternate, you will alternate as to exercising the challenges first if after all the challenges are exercised we should have fifteen survivors they will sit as jurors in the order in which they survived as the 13th, 14, 15th person will be your alternates. You're free to exercise the challenges from any place within the array during any one of the seven rounds.

In other words, you are not in the 7th round, you are not confined to the highest number of prospective jurors.

For example, perhaps I'm belaboring the obvious in [9] this process, number one, two, three and four and 5 are challenged the jurors who are called first, third, fourth or fifth are challenged, the first juror will be Juror No. 1, too, and Juror No. 2 will be Juror No. 6. This way you have the advantage of knowing who you get if you exercise the challenge.

I will ask all the questions, I will, because it is a narcotic case and one of the questions that I inevitably ask in a narcotic case is whether any juror has had any experience either through his family or directly with narcotics. And I guess, surprisingly a large number of jurors who have relatives who overdosed or cousins who has a problem, I will indicate to those jurors who has to tell me I'll put the question in a way it won't embarrass any jurors. I'll talk in terms of jurors or any close relatives. No juror has to raise his hand, thereby identifying himself publicly who, himself, or herself, has a problem, or has a child with a problem I'll say, a close relative, I will meet with them in Judge McLaughlin's jury room with counsel.

I will question those jurors in a way that obviously they won't be ashamed to discuss this matter by the other prospective jurors, thereby minimizing embarrassment, and hopefully maximizing candor. And even in those sections I will be the only one who is to address any questions to a juror.

[10] What I will do is, after I meet my voir dire of all the jurors, I will meet with you, and I prefer to have my side bars in the jury room so that we don't have to worry about stage whispers being overheard.

Exercising challenges in a way indicate to a juror who was waiving a challenge, things of that sort. I will meet with you in the jury room briefly. You will then tell me if I omitted any questions, if there is any follow-up based upon the responses of any jurors you would like me to engage in.

Then I will go out and ask any questions appropriate.

I will hear any colloquy discussions on challenges for cause in Judge McLaughlin's jury room.

I intend to cover the areas, I intend to cover on the voir dire are obviously prior jury experience, experience or relatives or friends who are engaged in law enforcement. People who know attorneys, people who work for attorneys, people who love everybody, witnesses at a trial, people who have had any close friends or relatives, either who has been a friend or who had contact with narcotics, anybody for any reason feels they could not sit fairly on the case that involves cocaine and anybody who has ever been the victim of a crime.

I will ask each defendant what they do for a living, what their household members do for a living. If they have any children in school. I will ask if they have gone to public school, parochial school, private schools, because some of you [11] may be concerned with the possibility that certain schools may not have drug problems and, oh, my god, and let me ask you now, is there any additional area that you wish me to cover?

MR. NISONOFF: Your Honor, your Honor indicated he was going to ask whether some of the jurors have jury experience, I would ask you to include in that, grand jury.

THE COURT: I was going to.

MR. NISONOFF: The second thing.

THE COURT: This is just areas. This doesn't mean I'm asking only six questions.

MR. NISONOFF: I understood what your Honor said, that the questions, whether they know members of the U.S. Attorney's Office, law enforcement officials, are you asking for the government to give you a witness list and ask the jurors if they know those witnesses.

THE COURT: I was going to do that. I want to minimize the possibility that somebody might be familiar with the witnesses.

Are abt if these people not citizens of the United States?

MR. NISONOFF: Mine is not.

THE COURT: As long as I have one, I'm just going to ask if anyone feels he would be influenced by the fact that a defendant is not a citizen. I'll ask him to bear in mind, people in this country are entitled to the same consideration [12] anybody feels he would have any difficulty applying that, he'll please let me know.

Do you have a problem with that, Mr. O'Shea?

MR. O'SHEA: Normally, I would think it's a valid discovery request, nothing more than that and the government's not required to turn over an exhibit list since all of our testimony in this case is coming through agents. I have no problem formally; I would.

THE COURT: Okay.

Normally, I normally solicit a witness list, namely because I want to balance in my own mind that the trial, the imminent, which favors the guessing of a witness list, is less opportunity to have an improper approach to a witness and each of the trial this is very long it states it's almost a week, I have also have to consider there is a possible juror may know a witness.

If all your witnesses are agents, of course, I am going to be asking if anyone is affiliated with law enforcement work.

MR. O'SHEA: Yes. The other thing, Judge, in this case the Title 3 intersects consensual phone calls, all of those recordings are in Spanish and I think it would be appropriate to find out if anyone is Spanish speakers on the jury so we don't have Spanish speakers acting as mini experts and take the evidence as it comes in terms of translation and [13] and the court's instruction.

THE COURT: That's going to be difficult. I can ask all the right questions and get all the right answers, if some jurors know Spanish better at interpreting he's still going to tell his friends, I will tell them by the way of a question that we don't want to have experts on the jury, all jurors are to rely on their experience in life and their common sense.

The fact that different people perceive different events differently, the reason we have 12 jurors, not one juror deciding the case.

You cannot decide the case on the basis of other than what you have learned in the court, either through the instructions and interpretation of evidence, and I'll ask each one, especially when I deal with a Spanish question I'll say, "Can you follow that general rule of law?"

Yes, Mr. Nisonoff.

MR. NISONOFF: I object. The jurors' function is to find facts, and if the juror understands Spanish, if he can understand the wording on the tape, all he's doing is finding fact.

THE COURT: Mr. Nisonoff, my answer to you is that, I took three years of Spanish in high school and being a magistrate I have a very modest ego, if I had more developed ego I might decide I use, I have a more better understanding than the interpreter and for that reason I don't have a certified [14] interpreter that has been qualified, except for the natural tendency for a

juror to be precious when they're with their peers I would let the other jurors know that the interpreter is the alternate source of the direct link with the continuing concern.

MR. WAUBERG: What about excusing un-Hispanic-speaking people?

THE COURT: I'm not going to do that.

If you feel you want to keep Spanish-speaking people off of the jury that is why God and Magistrates grant preemptory challenges.

MR. WAUBERG: I have another one, since all witnesses are government's agents.

THE COURT: Yes, I'm sorry, Mr. Wauberg.

MR. WAUBERG: Would you ask them whether they would give more credence?

THE COURT: That's part of the normal question. I instruct them, no one is entitled to greater weight because of occupation they hold. If there are any finishing touches, questions you have, why don't you wait till I cover my voir dire.

Now, the next question is, I have no right, nor will I attempt to ask the defendants to identify any witnesses now because of the fact, not having heard the government's case, you're under no obligation to predict you'll call witnesses.

Bear in mind, if somebody recognizes your witness [15] you may have disqualified a juror it may well be a juror who you might want to keep on the jury. You might not like the alternates; number 1, alternate No. 2, as the case might be. What I will do, when I come upstairs you will hand Mrs. Kollman a piece of paper, Mr. O'Shea will hand the government list on them to the extent they wish to identify their witnesses, I will not identify to the jurors which side will call which witness.

So, you don't have to concern yourself with the fact you might have an introductory case. This appearance you are not producing much.

If you want to hand up a witness list, feel free to hand it up to Miss Kollman.

Finally, who is your case agent?

MR. O'SHEA: Preston Grubbs.

THE COURT: G-R-U-B-B-S?

MR. O'SHEA: Right.

THE COURT: If there is some question as to whether there is or is not, he is intended to ask the defendant, before the jurors are brought in, whether they have any objection to a Magistrate selecting a jury, I will explain to them. I want to explain to them, they have a right to a trial before a district judge and judge of higher rank than myself. They will have a trial before a District Judge. I'm participating in the trial solely to the extent of selecting a jury.

[16] Please, prepare them for this question. If anybody has an objection, then we'll deal with it or Judge McLaughlin, hopefully, will deal with it.

Is there anything else?

MR. WAUBERG: Yes, your Honor. On several days, I guess the week of 5/16, Mr. Fabricant will substitute for me. You might ask if they know him.

Also, I have to leave here at three o'clock to go to St. Louis for a Federal Court proceeding.

THE COURT: Hopefully we'll, I'll doubt we'll be finished.

Is there anything else we can do for anybody?

MR. O'SHEA: I don't think so, Judge.

THE COURT: Do me a favor. Go without passing. to Judge McLaughlin's courtroom. He would be faster, we are all there faster, we can get going faster and we can send Mr. Wauberg to St. Louis.

(Proceeding concluded)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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86 CR 266

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOSE GOMEZ, *et al.*,
Defendants.

JURY SELECTION BEFORE A. SIMON CHREIN, CHIEF MAGISTRATE

February 9, 1987

[2] THE COURT: Ready to start, gentlemen?

MR. O'SHEA: We are missing a chair.

THE COURT: Take a chair from another table. Is that a major logistical problem? Let me swear the interpreters. Are both interpreters here?

R. VAN NORMAN WHITFORD and JOSE A. MONTALDO, were duly sworn as interpreters by the Court.

THE COURT: Gentlemen, I understand that when the question was posed to some or all of the defendants as to whether or not they wished to consent to a Magistrate selecting the jury, with the understanding that the case would nonetheless be tried by an Article 3 Judge, that some defendants have objected to the procedure of a Magistrate jury selection. Is that correct?

MR. WARBURGH: That is my understanding, yes.

THE COURT: Do all of the defendants object, or just some?

MR. LEVINE: On behalf of my client, he objects to the jury selection before the Magistrate.

MR. BATCHELDER: On behalf of Mr. Salazar, Mr. Salazar objects, Your Honor.

THE COURT: Do any other defendants object to a Magistrate selecting the jury?

MR. WARBURGH: I need an interpreter. Mr. Gomez objects.

[3] THE COURT: That leaves me with just two additional—

MR. MILLER: Let's have a severance and we will try our own case.

THE COURT: I am not talking about a severance. Mr. Salazar has objected, is that correct, Mr. Batchelder?

MR. BATCHELDER: That is correct, sir.

THE COURT: Mr. Levine, Mr. Tesina has objected?

MR. LEVINE: I did that originally, Judge.

MR. MILLER: No objection.

THE COURT: Mr. Warburgh, your client has objected?

MR. WARBURGH: Mr. Gomez objected.

THE COURT: Mr. Nisinoff?

MR. NISINOFF: He has not objected, Your Honor.

THE COURT: Mr. O'Shea, what is the government's view as to whether we can proceed?

MR. O'SHEA: Your Honor, I believe the view that you espoused earlier in your own courtroom, that the selection of the jury by yourself, the Magistrate, is perfectly proper. The government's position is that we should proceed with the jury selection.

THE COURT: I intend to proceed with the selection. In the event Judge McLaughlin decides that he [4] would prefer to select the jury, either on his own initiative or at the request of any counsel, inasmuch as no juror will be sworn as a trial juror, they will, of course be sworn for the voir dire, there would be no jeopardy. There would be no prejudice and Judge McLaughlin would be free to discharge whatever jury we select today.

My own view of the matter is that the selection of the jury, even over the objection, or without the consent of the defendants has been approved in other matters within this Circuit.

Yes, Mr. Batchelder?

MR. BATCHELDER: Do I understand it that the Second Circuit has passed on the propriety of Magistrates over the objection, or whether—

THE COURT: No, they have approved the procedure, my understanding is.

MR. BATCHELDER: They have not, as I understand it, approved the procedure if the defendant wishes to, because the Magistrate Act has been construed narrowly not to confer that power, as I understand it.

THE COURT: Mr. Batchelder, what I have indicated I will do, unless both sides object, is to proceed to select the Jury and you can raise whatever objection to the panel selected and to the manner of its selection before Judge McLaughlin on the 17th when the trial begins. [5] If Judge McLaughlin or in fact I would ask that you bring it to Judge McLaughlin's attention at the close of this selection process. If he chooses to select the jury by himself, then he is free to do so.

MR. BATCHELDER: Your Honor, I don't—

THE COURT: You have your exception.

MR. BATCHELDER: I realize I am as anxious as Your Honor to bring this matter to a conclusion, but in defense of my client's interests, Your Honor, I think it would be a brave person, Judge McLaughlin included, who after having wasted three, four hours of what we are doing here, to automatically say, no, I don't think Magistrate Chrein has the power, so therefore, we are going to go ahead.

I am submitting if my client objects to jurisdiction, as I understand the Magistrate Act, unless my client consents, and you do not have jurisdiction to do what we are about to embark on, and that is all the record I am making.

THE COURT: Does anybody feel that some inquiry should be posed to Judge McLaughlin now?

MR. MILLER: Judge

THE COURT: I see no need for such an inquiry. I believe the matter has been dealt with. I don't think there was a specific central issue to any case, but jury selections by Magistrates have been approved in both this [6] Circuit and other Circuits. I unfortunately do not have the cases at my fingertips at this point.

MR. O'SHEA: I don't have the cases either, Your Honor. But I believe you are correct. I have no objection, however, if the Court wishes to inquire of Judge McLaughlin that he would like to do at this point. It is entirely up to the Court.

THE COURT: Mrs. Culman, can you get me Judge McLaughlin's law clerk on the phone?

THE CLERK: Yes, sir.

THE COURT: In fact, I am going into chambers and deal with it myself. Are they getting somebody? I will speak to him. They are coming in. Yes, Mr. Warburgh?

MR. WARBURGH: We have one interpreter in the Courtroom.

THE COURT: There is a machine.

MR. WARBURGH: Yes, I understand. There came a time here when I needed an interpreter to speak to my client briefly, privately, and he had to stop doing what he was doing to come over and aid me. I don't think it is important now during jury selection process.

THE COURT: Then I will make a note of that and we will tell the Judge. You can raise that with Eileen Levine before the trial. All right, I am going to proceed to select the Jury. Judge McLaughlin's view of the law was [7] the same as mine. Those parties that object, and we have recorded on the record who has objected and who has consented, that those parties who object are deemed to have an objection. I assume the ground is that jury selection being part of the trial, and a Magistrate not being permitted even with waiver to try a felony case, that this is a part of the trial and the parties insist that all aspects of the trial or those objecting parties insist that all aspects of the trial be conducted by an Article 3 Judge, your exception is noted and when the jury comes up we will proceed to pick the jury.

I would ask that any friends or relatives or spectators stay within the first two rows on the right side of the room. I intend to fill the remainder with prospective jurors. So if any of you have, if there are any spectators or people who are not prospective jurors, sit in the first row alone where the three people are seated now.

MR. NISINOFF: Stay right there.

THE COURT: Fill up my right side first. Are those two gentlemen deputy marshals?

A VOICE: Yes, sir.

THE COURT: Could you possibly position yourself over those two benches. I intend to use those benches for prospective jurors. There must be an extra chair or two that you can use. Have you phoned for the jurors yet?

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EXCERPT FROM TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE DISTRICT JUDGE

February 17, 1987

[11] THE COURT: What is Warburgh's position? Was he retained?

MR. AXELROD: He was retained, your Honor, and we did receive some money in the case. I personally don't know what the amount was. I know that a substantial amount was not paid.

However, it does not have anything to do with the fact that we are aware of our obligations and Mr. Warburgh intends to conduct this case judicially and properly.

THE COURT: I don't see any problem, do you?

MR. O'SHEA: I don't, Judge.

THE COURT: And if Mr. Warburgh wants to at some point apply to be appointed, I am perfectly willing to entertain it.

MR. O'SHEA: That sounds reasonable, Judge.

THE COURT: Why don't you tell that to your client.

MR. AXELROD: I don't know if you want me to tell him or if you want to tell it to him.

THE COURT: You tell him.

(Whereupon, the following takes place in open court.)

THE COURT: The final housekeeping matter is the matter of jury selection.

It was brought to my attention that at least one counsel objected in front of Magistrate Chrein to the fact [12] that Magistrate Chrein was picking the jury. I find this remarkable since all of us had agreed a month ago that the magistrate would do it.

It is also my understanding that the magistrate has the power, in any event, regardless of any objection. But in case there is a problem let me now ask if there is any one juror for whom a challenge for cause was not sustained by Magistrate Chrein and would you like to renew the objection?

MR. BATCHELDER: Your Honor, I am that one counsel who elected to raise that issue. I did so, your Honor, based upon a discussion with my client who advised me that he did not wish, despite the—I guess he did not understand what I had previously spoken to him concerning what the effect was.

Your Honor, I know—and I am not raising the issue to this panel—that I can select a certain jury.

Your Honor, the position of my client is as follows:

That he believes that he is entitled to have a judge select the jury.

Your Honor, I have looked at the Magistrate's Act fairly closely. I have also looked at the local rules and the other local rules of other jurisdictions, and I know of no case that indicates that the magistrate does have

the power, and I was unable to find one, and perhaps my research is defective. But as I read the Magistrate's Act what I find is [13] that as a convenience to judges, and I am not adverse to convenience, but this has grown up that the magistrate selects the judges—

MR. NISONOFF: The jurors.

MR. BATCHELDER: Excuse me, the jurors.

I believe if my client wishes to raise this issue that it is a jurisdictional issue, not an issue to a specific juror, but a jurisdictional issue. And I regret, your Honor, that it was brought up at this time. However, I think my client, as it was explained to him outside, did not understand my waiver on his behalf and I apologize to the Court on his behalf.

THE COURT: The Court rules against that issue relying on United States against Ford 797 1329, U.S. against Peacock, 761 F. 2d, 1313 and United States against Rivera-Sola, 715 F. 2d 856, all three of which indicate that so long as there is a de novo rule available by the District Judge there is no problem.

I am now making a de novo rule available to you if there is any juror you want to object to.

MR. BATCHELDER: I cannot point to any specific juror obviously, your Honor. But I would like to ask the Court, are those Second Circuit cases?

MR. BATCHELDER: No, they are not.

MR. BATCHELDER: That's where I was researching.

[14] Thank you, your Honor.

MR. O'SHEA: I would like to note for the record, Judge, the only juror who was challenged for cause was excused with the Government's consent.

THE COURT: Yes. I see the tactic, Mr. O'Shea.

Are we ready to begin?

MR. O'SHEA: Yes, Judge.

THE COURT: If you get the jury.

(Whereupon, at this time there was a pause in the proceedings.)

THE COURT: Gentlemen, we have another juror problem.

Juror number five has a death in the family and must attend a funeral on Thursday. She can, however, sit on Friday.

My inclination would be to accommodate her schedule, that we sit on Friday and let her take off Thursday.

MR. BATCHELDER: Yes, sir.

THE COURT: Or we can excuse her and put in an alternate.

MR. MILLER: We are better off working on Friday and stay off on Thursday and let her go to the funeral.

MR. O'SHEA: I agree.

THE COURT: Everybody agree?

MR. NISONOFF: Yes.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 238 to 242, Dockets 87-1243 to 87-1246 and 87-1264

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,
Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,
Defendants-Appellants.

Argued Oct. 19, 1987

Decided June 1, 1988

Before OAKES, CARDAMONE and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is en-

titled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (McLaughlin, J.) for narcotics-related offenses.

FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Colombian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered Chavez-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chavez-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine—the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar—and verifying that that transaction involved cocaine—as well as

discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. The defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts of the indictment, the broadest of which alleged that Salazar and Chavez-Tesina conducted a narcotics racketeering enterprise in violation of Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chavez-Tesina, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chavez-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed.R.Crim.P. 8(b), 12(b), and 14. After jury selection—presided over by a magistrate—trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chavez-Tesina for narcotics racketeering, illegal interstate travel, posession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrear was acquitted on the conspiracy charge. This appeal followed. We affirm.

DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate—rather than a district court judge—may preside during jury selection.

I *Jury Selection by a Magistrate*

Judge McLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636."). Salazar, Chavez-Tesina, and Gomez objected to the delegation at the beginning of *voir dire* and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants *de novo* review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent,

appellants declined the offer. There is no claim of prejudice from the delegation of the *voir dire* to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defendant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

A. Statutory Provisions

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. *See, e.g., Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1] provides that a magistrate may hear and determine pretrial matters—

[1] Section 636(b)(1)(A) provides:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (1982).

with certain enumerated exceptions—subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2] a magistrate may conduct hearings on specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to *de novo* determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in *United States v. DeFiore*, 720 F.2d 757, 765 (2d Cir.1983), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury

[2] Section 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that

> [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

Id. § 636(b)(1).

selection in felony cases. *Haith v. United States*, 342 F.2d 158, 159 (3d Cir.1965) (per curiam) (failure to object to or claim prejudice from delegation waives right to contest delegation), *aff'g* 231 F.Supp. 495 (E.D.Pa. 1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may—consistent with both § 636 and the Constitution—preside over jury selection despite the defendant's objection so long as *de novo* review is available in the district court. *See United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir.), *cert. denied*, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985); *United States v. Bezold*, 760 F.2d 999, 1002 (9th Cir.1985), *cert. denied*, 474 U.S. 1063, 106 S.Ct. 811, 88 L.Ed.2d 786 (1986); *see also United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir.1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting *en banc* determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. *See United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

> [t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that *it is not restricted in any way by any other specific grant of authority to magistrates.*
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

1976 House Report, *supra*, at 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); *see also* S.Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selection, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment *beyond* duties traditionally categorized as "pretrial." Hence, even assuming *arguendo* that jury selection falls on the "trial" side of the line between "trial" and "pretrial"—a line that is, at best, often blurred—the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(3) (1982), and jury or nonjury civil trials, *id.* § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases *without* consent of the parties. Yet conditioning the holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted

by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. *E.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 3252, 92 L.Ed.2d 675 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Id.* Here, the legislative will is evident. As the Seventh Circuit stated. "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340-41 (7th Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979); *see also Ford*, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on § 636(b)(3) is Constitution or conflicting law).

B. Constitutional Concerns

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are two aspects to the separation of powers doctrine—a cornerstone of our federal constitutional

structure—that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. *See Schor*, 106 S.Ct. at 3256; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc) (noting dual components of separation of powers cases), *cert. denied*, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984).

1. *Relationships Between the Three Branches*

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. *Schor*, 106 S.Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be . . . blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never . . . be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitu-

tionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 58 L.Ed.2d 867 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances—an integral component of the constitutional structure—which serves to prevent each branch from encroaching on the power of the other. *The Federalist*, *supra*, No. 51, at 321-22 (J. Madison).

With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4257; *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for " 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .' " *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 3193-94, 92 L.Ed.2d 583 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 2780, 77 L.Ed.2d 317 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,' " *Schor*, 106 S.Ct. at 3256

(quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3336, 37 L.Ed.2d 409 (1985)), we examine the effect of such a delegation. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, *id.* § 631(b), and decide what matters are assigned magistrates, *id.* § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the deision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's *encroaching upon* the power of another. *Cf. United States v. Raddatz*, 447 U.S. 667, 682-83, 100 S.Ct. 2406, 2415-16, 65 L.Ed.2d 424 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. *See Raddatz*, 447 U.S. at 681-84, 100 S.Ct. at 2415-17 (upholding suppression hearing referred to magistrate with review); *Mathews v. Weber*, 423 U.S. 261, 271-72, 96 S.Ct. 549, 554-55, 46 L.Ed.2d 483 (1976) (upholding social security benefit cases referred to magistrate with reviews); *see also Ford*, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir. 1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981) (same). So long as the " 'essential attributes' of judicial power are retained in the Art. III Court," *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81, 102 S.Ct. 2858, 2876, 73

L.Ed.2d 598 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.

The availability of *de novo* review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In *Raddatz*, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684, 100 S.Ct. at 2414-15, 2416. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, *id.* at 681, 100 S.Ct. at 2415, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," *id.* at 683, 100 S.Ct. at 2416. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors." *Id.* at 686, 100 S.Ct. at 2417 (Blackmun, J., concurring); *see also Northern Pipeline*, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing *Raddatz*); *Mathews*, 432 U.S. at 271, 96 S.Ct. at 554 (final decision remains with judge); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III").

Similarly, the trial judge here was "waiting in the wings" and offered *de novo* review, which the appellants declined. Nor do appellants claim that *de novo* review would have been ineffective. *Raddatz* compels the conclusion that neither delegation of *voir dire* per se nor delegation under the facts of this case erodes the power and independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. *Article III Rights*

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." *Schor*, 106 S.Ct. at 3256 (quoting *United States v. Will*, 449 U.S. 200, 218, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. *E.g.*, *Schor*, 106 S.Ct. at 3256-57; *Pacemaker Diagnostic*, 725 F.2d at 541-42. Here, appellants affirmatively objected to the delegation of *voir dire* to a magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III. *cf. Schor*, 106 S.Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magis-

trate. While not minimizing the importance of jury selection in the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during *voir dire* or to hear challenges for cause. *See Ford*, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, *see, e.g., Lewis v. United States*, 146 U.S. 370, 373-74, 18 S.Ct. 130, 137-38, 36 L.Ed. 1011 (1892), or on when a trial begins for purposes of the Speedy Trial Act, *see, e.g., United States v. A-A-A Elec. Co.*, 788 F.2d 242, 246 (4th Cir. 1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional protections attach can vary with the individual right involved. *Cf. Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501, 509 n.8, 104 S.Ct. 819, 828 n.8, 78 L.Ed.2d 629 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of *de novo* review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts

to delegate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the Constitution where, as here, the district court affords *de novo* review of unsustained challenges to jurors for cause.

II *Single or Multiple Conspiracy*

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indictment for single versus multiple conspiracies arises frequently in criminal jurisprudence. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); *United States v. Nersesian*, 824 F.2d 1294, 1302-03 (2d Cir.) (evidence properly supported single conspiracy charge), *cert. denied*, —— U.S. ——, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Miley*, 513 F.2d 1191, 1205-07 (2d Cir.), *cert. denied*, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975); *United States v. Borelli*, 336 F.2d 376, 378 (2d Cir. 1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies—a recurring problem on appeal—Salazar contends that the reverse situation fatally impaired his trial.

We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." *Miley*, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspiracy, we would be hard

pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. *Cf. Nersesian*, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected." *United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stonefaced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules government joinder and severance still apply.

III *Joinder and Severance*

Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tesina. Joinder of these defendants in the same indictment was therefore proper under Fed. R. Crim. P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. *See United States v. Barton*, 647 F.2d 224, 230-40 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980); *United States v. Gallo*, 668 F. Supp. 736, 748 (E.D.N.Y. 1987), *mandamus granted on other grounds*, 844 F.2d 283 (2d Cir. 1987); *United States v. Castellano*, 610 F. Supp. 1359, 1396-97 (S.D.N.Y. 1985). The only question is whether denial of the Fed. R. Crim. P.

14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. *Nersesian*, 824 F.2d at 1303.

A. Salazar

The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a *severance* argument--as appellant contends --but rather a *relevance* argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. *See United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923, 106 S.Ct. 258, 88 L.Ed.2d 264 (1985). Hence, the denial of the severance motion must stand.

B. Shanks-Carrera

Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do not mandate separate trials. *Nersesian*, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. *See, e.g., Weisman*, 624 F.2d at 1130.

In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

C. Vallejo and Gomez

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

IV *Evidentiary Issues*

A. Rule 105 Limiting Instructions

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's and Gomez's requests that limiting instructions be given contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when co-conspirator statements were admissible against some—but not all—defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.

> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed. R. Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, *see* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065 (1977 & Supp. 1987), the weight of authority is to the contrary. *See United States v. Carson*, 702 F.2d 351, 367 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), *cert. denied*, 462 U.S. 1108, 103 S.Ct. 2457, 77 L.Ed.2d 1335 (1983); *United States v. Losada*, 674 F.2d 167, 171-72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982); *see also* 1 J. Weinstein, *Weinstein's Evidence* ¶ 105[05], at 105-44 (1986) ("The jury may be instructed either as the [limited] evidence is admitted *or as part of the general charge*.") (emphasis added; footnote omitted).

The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. *See United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984); *United States v. Dobish*, 708 F.2d 240, 243 (6th Cir. 1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. *See Losada*, 674 F.2d at 171-72 (looking for prejudice); *Weisman*, 624 F.2d at 1130 (same); *United*

States v. Toliver, 541 F.2d 958, 963 (2d Cir. 1976) (same).

We conclude that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting instructions upon the admission of coconspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. *See United States v. Teitler*, 802 F.2d 606, 617 (2d Cir. 1986). Further, the evidence admitted without contemporaneous instructions was physical evidence that lent itself to compartmentalized consideration. *See, e.g., Toliver*, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

B. DEA Expert Testimony

Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. *See Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400-01 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986); *United States v. Young*, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

C. Sufficiency of the Evidence

Chavez-Tesina, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. *Losada*, 674 F.2d at 173. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and all permissible inferences construed in its favor. *United States v. Dazzo*, 672 F.2d 288 (2d Cir.), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 77 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal intent may be established . . . through circumstantial evidence." *United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir.), *cert. denied*, 459 U.S. 858, 103 S.Ct. 128, 74 L.Ed.2d 111 (1982). We examine in turn the evidence against each appellant.

1. *Chavez-Tesina*

Chavez-Tesina's convictions arose primarily out of his involvement in the 50 kilogram transaction. Salazar described his "partner" to be de la Cova as a Colombian of Japanese descent who had lived in London. Chavez-Tesina matched the physical description and possessed a British driver's license and Colombian passport when he was arrested. When Salazar told de la Cova that his partner was travelling in New Orleans, independent evidence established that Chavez-Tesina was in fact then in New Orleans.

More important, there was testimony to the effect that Chavez-Tesina was in New Orleans looking for cocaine

that would be acceptable in the New York market. As the transaction approached accomplishment, Salazar made telephone calls to Chavez-Tesina's home, confirmed by a pen register. The subject of these calls was the cocaine transaction. In one call, Salazar referred to the other party as "Diego," Chavez-Tesina's first name. The jury was entitled to believe that this evidence linked Chavez-Tesina to Salazar, the RICO enterprise, and the 50 kilogram deal.

2. *Vallejo*

Vallejo, a less active participant in the affairs providing the basis for the charges, was convicted of conspiracy to possess cocaine and possession with intent to distribute arising out of the March 17, 1986 two kilogram cocaine sale to de la Cova. Vallejo argues that there was no proof that he was involved in the conspiracy. The evidence, he argues, shows at best mere association with a drug dealer.

Agent de la Cova heard Salazar tell Vallejo on March 15th that he had something "very, very good." From this the jury could reasonably conclude that Salazar referred to cocaine and that Vallejo comprehended this meaning. Just two days later, in Vallejo's presence, Gomez delivered two "favors" to Salazar. It is beyond dispute that Gomez delivered cocaine because Gomez said shortly before he was arrested that the "favors" were kilograms of cocaine. This cocaine subsequently was transported to Vallejo's house.

Further support for the inference that Vallejo was involved in a narcotics conspiracy and distributed cocaine is the fact that he delivered a small amount of cocaine to Salazar on March 21st—only moments after Salazar called and asked for some. When he was arrested, Vallejo had a beeper, $2000 in cash, a small amount of drugs and drug paraphernalia, again evi-

dencing that his business relationship with Salazar related to the narcotics trade. *See Carson*, 702 F.2d at 368. This proof, as well as the reasonable inferences arising from it, supports the jury's finding that Vallejo was a knowing participant in the conspiracy.

3. *Shanks-Carrera*

Shanks-Carrera was alleged to be a supporting player in the 50-kilogram transaction. It was he whom the DEA observed carrying a duffel bag—later found to be filled with cocaine—into the apartment arranged as the delivery site. Shanks-Carrera was acquitted of conspiracy, but convicted of possession.

Testifying at trial, he claimed that he had no knowledge that the duffel bag contained cocaine. Appellant explained that incriminating statements made at the time of his arrest—and hiding when DEA agents arrived—were the results of fear and a desire to protect his brother, who allegedly gave him the duffel bag. The jury was in a better position to asess these issues of credibility. Viewing the evidence in the light most favorable to the government, we find it sufficient to establish that the appellant possessed cocaine with the intent to distribute it.

CONCLUSION

Accordingly, for the reasons discussed above, the judgments of conviction are affirmed.

OAKES, Circuit Judge (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of permitting magistrates to conduct jury voir dire in felony cases raises serious constitutional questions. *See United States v. Ford*, 824 F.2d 1430 (5th Cir.1987) (en banc), *cert. denied*, —— U.S. —— 108 S.Ct. 741, 98 L.Ed.2d 776 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." *Id.* at 1435 (quoting *Gray v. Mississippi*, —— U.S. ——, 107 S.Ct. 2045, 2056, 95 L.Ed.2d 622 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 88-89, 106 S.Ct. 1712, 1718-19, 90 L.Ed.2d 69 (1986). And, while double jeopardy does not attach until the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160, 57 L.Ed.2d 24 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, *accord* Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986), to be present while a jury is selected, *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed.2d 1011 (1892); *United States v. Crutcher*, 405 F.2d 239, 242-43 (2d Cir. 1968), *cert. denied*, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Fed.R.Crim. P. 43(a), and to the assistance of counsel during jury

selection, *see Brewer v. Williams*, 430 U.S. 387, 399, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.E.2d 78 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in *United States v. Ford*, 824 F.2d at 1436-37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. *See United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. *See United States v. Ford*, 824 F.2d at 1437; *but see id.* at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forthcoming unless and until the Supreme Court decides the constitutional question.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the impor-

tance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. at 217, 102 S.Ct. at 946. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel short-changed, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I cannot think that the practice—at least in a jurisdiction such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire—is one that can save much judicial time. It is a practice that is not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty-eight

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Docket Nos. 87-1243, 87-1244, 87-1245, 87-1246, 87-1264

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,
Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants WILLIAM SALAZAR, HUGO SCHANKS-CARRERA, and JOSE GOMEZ.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

SUPREME COURT OF THE UNITED STATES

No. 88-5014

JOSE GOMEZ,
Petitioner

v.

UNITED STATES

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 88-5158, *Diego Chavez-Tesina v. United States* and a total of one hour is allotted for oral argument.

January 9, 1989

SUPREME COURT OF THE UNITED STATES

No. 88-5158

DIEGO CHAVEZ-TESINA,
Petitioner

v.

UNITED STATES

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 88-5014, *Jose Gomez v. United States* and a total of one hour is allotted for oral argument.

January 9, 1989

JOSEPH F. SPANIOL, JR.
CLERK
Supreme Court, U.S.
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Nos. 88-5014 and 88-5158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ, *Petitioner,*

v.

UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.*, permits a district court, over a defendant's objection, to delegate jury selection to a federal magistrate in a felony trial.

2. Whether a district court's delegation of jury selection in a felony trial over the defendant's objection violates Article III or the Due Process Clause of the Constitution.

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OPINION BELOW

The opinion of the court of appeals is reported at 848 F.2d 1324 and reproduced at J.A. 21-48.[1] No opinion of the district court is reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1988. J.A. 21. A timely petition for rehearing was filed by petitioner Gomez and two co-defendants and denied on August 4, 1988, Judge Oakes dissenting. J.A. 49. Petitioners Gomez and Chavez-Tesina filed *pro se* petitions for certiorari and permission to proceed *in forma pauperis* on July 5 and July 22, 1988, respectively, which counsel supplemented on October 1, 1988. The two petitions were granted and consolidated on January 9, 1989, and petitioners were also permitted to proceed *in forma pauperis*. J.A. 51-52. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Eleven defendants, including petitioners, Jose Gomez and Diego Chavez-Tesina, were charged in a 21-count, superseding indictment filed July 7, 1986, in the United States District Court, Eastern District of New York, with various narcotics-related offenses committed between September 1985 and March 1986. J.A. 1. Gomez was charged with conspiracy to distribute, and actual distribution of, cocaine. 21 U.S.C. §§ 841 and 846 (1982 & Supp. IV 1986) (Counts 15 and 16). Chavez-Tesina was charged with similar violations (Counts 19 and 20), racketeering, 18 U.S.C. §§ 1962(c) and 1963 (1982) (Count 2), and violation of the Travel Act, 18 U.S.C. § 1952 (1982 and Supp. IV 1986) (Count 14).

On November 20, 1986, at a status conference, the District Judge, Joseph M. McLaughlin, scheduled jury selection before

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[1] J.A. refers to the Joint Appendix filed in this Court. Pet. A. refers to the petitioners' appendix annexed to this brief.

a magistrate.[2] On February 9, 1987, counsel for the five defendants who had elected to stand trial appeared before A. Simon Chrein, Chief Magistrate. J.A. 2. The magistrate instructed counsel to inform their clients they had a "right" to trial before a district judge and that "I'm participating in the trial solely to the extent of selecting a jury," and to ask the defendants if they had any objection. J.A. 12.

Three defendants, including petitioners Gomez and Chavez-Tesina, objected, arguing through counsel that the magistrate did not have jurisdiction under the statute and Art. III of the Constitution to conduct the jury selection. J.A. 13-15. At first, the magistrate responded that the defendants would be free to ask Judge McLaughlin to select another jury panel. J.A. 14-15. When counsel responded that the court would be unlikely to do so after "what we are doing here," the magistrate reluctantly agreed to have his law clerk consult the court. J.A. 15-16. The magistrate then reported that "Judge McLaughlin's view of the law was the same as mine" and that petitioners would be deemed to have an objection. J.A. 16-17. The magistrate did not explain what review procedure, if any, the court expected to perform.

During the ensuing *voir dire* examination, Magistrate Chrein repeatedly referred to Judge McLaughlin's superior role in explaining the law and controlling trial procedure. Tr. 26, 87, 135-36.[3] Nevertheless, the magistrate delivered substantial, preliminary legal instructions and questioned the

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[2] Because the Court Reporter's Office could not locate notes taken during this court session, it is not transcribed. Whether or not petitioners' *counsel* initially acceded to the court's decision, *see* J.A. 18-19, the District Court Docket Sheet does *not* indicate that petitioners were present, *see* Appellants' Joint Appendix in the Court of Appeals, p. 25, nor is there any other basis to infer that they initially consented.

[3] The transcript of the *voir dire* is not part of the record below and therefore is not included in the Joint Appendix. However, petitioners had the transcript prepared after certiorari was granted and have lodged it with the Clerk's office.

jurors about their ability to follow them. Tr. 17-48. He questioned the jurors, publicly and *in camera*, about their experience with and attitudes about drug-related and other crimes, excusing numerous jurors based upon their response, Tr. 48-76, and questioned each juror individually about his or her occupation and marital status. Tr. 97-129. Over petitioners' objection, he granted the government's request to ascertain whether any juror spoke Spanish. J.A. 10-11; Tr. 96-97.

Magistrate Chrein refused petitioners' repeated requests that the jurors be informed that the trial might last 3-4 weeks, Tr. 64, 67, 82-83, adopting instead the prosecutor's estimate of one week. Tr. 85. When several jurors expressed concern about scheduling conflicts, he excused two but denied petitioners' request to excuse a third, who feared his sister-in-law's death and funeral were imminent. Tr. 87-94.[4] After the government consented to the defendants' one formal challenge for cause, Tr. 126, the parties exercised their peremptory challenges and the jury selection was completed. Tr. 130-33.

On February 17, 1987, petitioners appeared for trial before Judge McLaughlin and, through counsel for a co-defendant, renewed their objection to the delegation of jury selection. J.A. 17-19. Judge McLaughlin offered to review any denial by Magistrate Chrein of defense challenges for cause, but petitioners did not invoke such "review" since petitioners' one formal challenge had been granted. J.A. 18-19. The court did not offer *de novo* review of any other aspect of the selection process, nor did the court order or review the *voir dire* transcript. The jury was sworn and testimony began. Ten days later, the jury found petitioners guilty on all counts.[5]

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[4] The transcript does not contain this juror's name or otherwise reflect whether the defense was forced to use a peremptory challenge to excuse the juror.

[5] During the trial, Judge McLaughlin repeatedly refused to give contemporaneous, limiting instructions under Fed. R. Ev. 105 to protect Gomez where the government offered co-conspirator hearsay or physical evidence against Chavez-Tesina or the other defendants.

Following sentencing, all five defendants appealed to the United States Court of Appeals for the Second Circuit and sought reversal of their convictions and a new trial on the ground that the district judge's delegation of jury selection to the magistrate had violated their rights under the Federal Magistrates Act [hereinafter the "Act"], 28 U.S.C. §§ 631-39, and Art. III and the Due Process Clause of the United States Constitution. Joint Opening Brief for Appellants Jose Gomez and Beimar Vallejo at 29-38.

Rejecting this argument, the court, over the dissent of (now Chief) Judge Oakes, affirmed the convictions. *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988). In an opinion by Judge Cardamone, joined by Judge Mahoney, the court held that the Act, which carefully specifies the duties magistrates may perform as well as standards and procedures for district court review, permits jury selection to be delegated under a clause authorizing magistrates to perform "additional duties . . . not inconsistent with the Constitution and laws of the United States." *Id.* at 1329-30, J.A. 28-30, citing 28 U.S.C. § 636(b)(3). The majority further held that the district judge's offer of *de novo* review of unsuccessful challenges for cause satisfied petitioners' rights under Art. III. *United States* v. *Garcia*, 848 F.2d at 1330-33, J.A. 30-37. The court did not address the due process issue.

Judge Oakes' dissent reasoned that delegation of jury selection to a magistrate, even where the district judge offers *de novo* review, raises serious constitutional questions. Judge Oakes argued that such delegation demeans a process that the Supreme Court repeatedly has held is a critical, first stage of

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While the racketeering charge against Chavez-Tesina involved a seven-month period and seven acts of racketeering, the indictment charged Gomez with a discrete, three-day involvement involving one substantive transaction. Petitioner Gomez's claim of error was rejected in the Court of Appeals. *United States* v. *Garcia*, 848 F.2d 1324, 1334-35 (2d Cir. 1988). J.A. 22-24, 40-42. While Gomez does not directly raise this issue here, the trial court's ability to assess the "effectiveness" of limiting instructions where he absented himself during the *voir dire* is discussed *infra* at 38-39.

the criminal trial; further concluded that *de novo* review would be impractical and perhaps illusory; and advocated prohibiting the procedure under the court's supervisory power. *United States* v. *Garcia*, 848 F.2d at 1337-38 (dissenting opinion), J.A. 46-48.

Gomez and Chavez-Tesina sought *certiorari* to review whether delegation of jury selection to a magistrate in a felony case, over a defendant's objection, is authorized by the Federal Magistrates Act and, if so, whether it meets Art. III and Due Process Clause requirements.[6] Agreeing that these issues were important and that the Court should resolve the split amongst the circuits,[7] the government joined in the request

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[6] A joint petition on behalf of co-defendants William Salazar and Beimar Vallejo, No. 88-5795, is pending. The Solicitor General suggested that its resolution be delayed pending determination of this appeal, principally because of the parties' belief, based upon the available record, that Vallejo had waived any objection during proceedings before the magistrate. However, the transcript of the actual *voir dire* questioning, prepared after *certiorari* was granted, reveals that Vallejo's counsel did, in fact, add his client's objection to that of petitioners. Tr. 44. (Vallejo's appellate counsel was not the attorney at trial.)

[7] Two circuits have held that the procedure exceeds the scope of the Magistrates Act. *United States* v. *Trice*, 864 F.2d 1421, ——, No. 87-2452, slip op. at 6-17 (8th Cir., Dec. 29, 1988) (convictions reversed); *United States* v. *Ford*, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, — — U.S. ——, 108 S.Ct. 741 (1988) (conviction affirmed due to appellant's failure to object in the district court). Two circuits have upheld the procedure on statutory and constitutional grounds, despite the defendants' timely objection. *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988); *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985); *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986). In the absence of timely objection, the First Circuit found no plain error and affirmed. *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983). *Accord*, *United States* v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984). Finally, one court declined to reach the merits because of its conclusion that the defendant had not

for further review. On January 9, 1989, the Court agreed to hear this appeal and to permit petitioners to proceed *in forma pauperis*.

SUMMARY OF THE ARGUMENT

I. The Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1982), authorizes federal judges to delegate their less significant tasks to magistrates so that the judges may perform their most important "traditional adjudicatory duty": the trial of felony cases. Mindful of litigants' Art. III and due process rights, Congress carefully circumscribed magistrates' trial jurisdiction and, in respect to all but the most ministerial or administrative tasks, set forth a procedure and standard for district court review. By permitting assignment of "additional duties . . . not inconsistent with the Constitution and the laws of the United States," 28 U.S.C. § 636(b)(3), Congress certainly did not intend to create jurisdiction for magistrates to conduct the "traditional adjudicatory duty" of jury selection at a felony trial. Such a construction would render superfluous the balance of this comprehensive act.

In the original, 1968 Act, Congress limited magistrates' trial jurisdiction to certain misdemeanor and petty offenses, and only on consent of all parties. While the legislative history of the 1968 Act contains no explicit discussion of jury selection, Congress must be presumed to have been aware that judicial precedent, rules and practice regarded jury selection as part of the trial and required district judges to personally preside. Thus, Congress' determination to deny magistrates any felony trial jurisdiction encompassed jury selection.

In 1976, Congress amended the statute in response to the courts' interpretation of the existing "additional duties" clause, § 636(b). Congress clarified the categories of pretrial and post-

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demonstrated prejudice. *United States* v. *Rodriguez-Suarez*, 856 F.2d 135, 139 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 875 (1989). The opinion in the latter case does not disclose whether the defendant objected in the district court.

trial duties that magistrates could perform and established a comprehensive review structure. The only duties for which Congress prescribed no procedure or standard for review were certain ministerial or administrative tasks—and undefined "additional duties" under new § 636(b)(3).

The legislative history of the 1976 amendment completely forecloses the court of appeals' illogical view that Congress, while attempting to clarify the statute's scope and review procedures, intended district judges, in their sole discretion, to freely assign "additional duties" no matter how constitutionally significant the function. While the House and Senate committee reports state that § 636(b)(3) was intended to permit district courts to "experiment" in the assignment of "additional duties" outside the category of "pretrial matters," Congress explained that the tasks it had in mind were "more administrative functions . . . in aid of the business of the courts." The purpose of assigning such functions was to make "increased time available to judges for the careful and unhurried performance of their vital and *traditional adjudicatory duties* . . ." (emphasis added). The legislative history further shows that Congress understood that the quintessential "traditional adjudicatory duty" was the felony trial—of which jury selection is a vital part. Indeed, the 1976 amendment was proposed by the Judicial Conference, which, consistent with history and practice, had omitted jury selection from its list of "additional duties" that magistrates were authorized to perform. In revisiting the statute, Congress' failure to disapprove the existing administrative interpretation was "persuasive evidence" that the interpretation was the "one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (hereinafter "*Schor*").

Delegation of jury selection in felony trials is also "inconsistent with the . . . laws of the United States," specifically, Fed. R. Crim. P. 24(a), which has the force of law, and the Jury Service and Selection Act, 28 U.S.C. §§ 1861 *et seq.*, and therefore is not authorized under § 636(b)(3). These "laws" authorize jurors to be selected or challenged only in the pres-

ence of the "court." The federal rules and all relevant provisions of the United States Code exclude "magistrate" from the definition of "court." In *Wingo* v. *Wedding*, 418 U.S. 461, 468-69, 472 (1974), this Court held that magistrates could not conduct habeas corpus hearings, because the Habeas Corpus Act only permitted such hearings to be conducted by "[t]he court, or justice, or judge." The 1976 amendment to the Magistrates Act partially overrode this decision by authorizing magistrates to handle pretrial and specified posttrial duties "notwithstanding any law to the contrary." It did not override *Wingo* with respect to the "additional duties" authorized by § 636(b)(3).

Finally, the consent and review provisions of the Magistrates Act reflect Congress' determination to avoid constitutional conflict in the administration of the statute. Consistent with this legislative intent as well as principles of statutory construction, the Court should construe the statute to avoid the serious constitutional questions raised by delegation of felony jury selection to a magistrate over the defendant's objection.

II. Even if Congress intended to authorize the assignment of jury selection to magistrates, such a procedure violates a felony defendant's individual right under Art. III of the Constitution to adjudication by a district judge. Art. III's lifetime tenure and irreducible salary provisions protect the litigant's interest in impartial, independent adjudication by judges insulated from outside pressure. The Court has recognized that, depending upon the importance of the individual's Art. III interest, the right to adjudication by an Art. III judge may be absolute. *Schor*, 478 U.S. at 848. There can be no greater interest in Art. III adjudication than during a felony jury trial.

The trial judge's role during jury selection is so crucial, both to the selection of an impartial jury and to the conduct of the remainder of the trial, that jury selection may not be distinguished from the subsequent phases of trial for purposes of Art. III. Selection of an impartial jury is specifically guaranteed by the Sixth Amendment and is indispensable to a fair trial. During *voir dire*, the judge must preliminarily instruct the prospective jurors on the law and must determine appro-

priate questions to ascertain whether each juror is racially or otherwise biased or unfit to serve. He may also be required to evaluate whether the prosecutor's motives in exercising peremptory challenges are racially discriminatory, *Batson* v. *Kentucky*, 476 U.S. 79, 86 (1986), or whether the jury *venire* as a whole is tainted by prejudicial, pretrial publicity. All judicial judgments during *voir dire* are inherently subjective, requiring the judge to rely upon his immediate perceptions of the participants' manner as much as their words, and as such are inherently unreviewable by another tribunal. In addition, jury selection is inseparable from the balance of the trial because the trial judge's subsequent determination of juror misconduct allegations, the effectiveness of limiting instructions, and the admissibility of evidence with a potential for prejudicing or confusing the jury, all require that the judge has personally observed the jury's behavior and comments during jury selection.

"*De novo* review" of the magistrate's decisionmaking during *voir dire* does not save its constitutionality. The Act's *de novo* review procedure for suppression hearings is constitutional because the district court independently determines such motions based upon the magistrate's proposed findings of fact and conclusions of law, and the hearing transcript. *United States* v. *Raddatz*, 447 U.S. 667 (1980). In contrast, the statute contains no procedure for review of the magistrate's selection of a jury, which implicates the defendant's superior constitutional interest in the reliability of the trial. *Id.* at 678-79. Rather, a magistrate merely presents the court a "final determination": a panel of jurors ready to be sworn. Even if, unlike this case, the court possesses a transcript, the questioning of each juror will have been far briefer than that of a suppression hearing witness. The district court will have no choice but to accept the magistrate's credibility determinations, thus applying a constitutionally-impermissible "clearly erroneous or contrary to law" standard. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (plurality opinion). The court will not be able to requestion jurors who were the subject of a disputed challenge for cause: jurors erroneously excused at

the prosecutor's request, or peremptorily excused by the defense following the denial of a challenge for cause, will no longer be available. For the court to reinstruct the jurors on principles of law or reexamine a juror would only reinforce the jurors' diminished view of jury selection as "essentially clerical."

III. Even if petitioners' right to an Art. III adjudication was not absolute during their jury selection, the assignment of this important function to a magistrate violated their right to due process of law. Under the due process analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), petitioners' private interest in an Art. III adjudication of jury selection at their felony trial was of the highest magnitude. Similarly, the risk of an erroneous determination was high, since Art. III presumes that a judicial officer without lifetime tenure or an irreducible salary cannot exercise impartial, independent judgment, and jury selection requires numerous such judgments. In this context, *de novo* review cannot detect or correct errors, nor was the review offered in this case more than a "facade": immediately before taking opening statements, the court, with no prior notice and without a transcript, offered to review unsuccessful defense challenges for cause, but no other aspect of the jury selection process. The public interest in the appearance and reality of impartial, independent adjudication during criminal trials is high; the government's need for the delegation procedure, which has been sparingly used by the district courts, is nonexistent. Rather than add a new procedural protection, petitioners merely seek to preserve the historic right of criminal defendants to the presence of a district judge at jury selection.

Because the magistrate was not empowered by Congress to conduct jury selection, he lacked jurisdiction to act. Whether invalidated on statutory or constitutional grounds, the procedure of delegating jury selection violates a defendant's basic constitutional right to a trial before a duly constituted, independent tribunal, and to an impartial jury selected by that tribunal, and is not susceptible to "harmless error" analysis. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A DISTRICT JUDGE TO DELEGATE JURY SELECTION TO A MAGISTRATE IN A FELONY TRIAL WITHOUT THE DEFENDANT'S CONSENT

A. The Evolution And Present Structure Of The Act

The position of federal magistrate was established in 1968 to replace and upgrade the existing, inadequate United States commissioner system. *See generally Mathews* v. *Weber*, 423 U.S. 261, 266-70 (1976); *Wingo* v. *Wedding*, 418 U.S. 461, 462-63 (1974); *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 350-59 (7th Cir. 1972). Congress created a new system of full- and part-time judicial officers serving eight- and four-year terms, respectively. Federal Magistrates Act of 1968, Pub. L. 90-578, Tit. I, § 101, 82 Stat. 1108 (1968) (current version at 28 U.S.C. § 631(e) (1982)). Under the legislative scheme, the Judicial Conference creates each position; a majority of the judges within each district fills it. 28 U.S.C. §§ 631(a), 633(b) (1982). These judges can remove a magistrate for "cause," 28 U.S.C. § 631(i)(1982) (original version at § 631(h)), or the conference can terminate the position for lack of need. §§ 631(i), 633(c), (1982). While the conference fixes salary levels, no magistrate's salary can be reduced below the level in place at the beginning of his term. 28 U.S.C. § 634(b) (1982).

The original Act defined the "jurisdiction and powers" of magistrates in § 636. Pub. L. 90-578, Tit I, § 101, 82 Stat. 1113 (1968). Subsection "a" authorized magistrates to perform the former duties of U.S. commissioners, to administer oaths and affirmations, and to conduct trials of certain "minor" misdemeanor or petty offenses as set forth in 18 U.S.C. § 3401, *as amended*, Pub. L. 90-578, Tit. III, § 302(a), 82 Stat. 1115 (1986). The latter section required that the magistrate inform the defendant of his *right* to trial before the district court and, where appropriate, his *right* to trial by jury. 18 U.S.C. § 3401(b), *as amended*, Pub. L. 90-578, *supra*. To invoke the magistrate's trial authority, the defendant had to waive *both*

rights; magistrates were not empowered to conduct jury trials, regardless of the defendant's willingness to consent. *Id.*

Subsection "b" permitted a majority of the judges within each district to adopt rules authorizing magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." These "additional duties" included, but were not restricted to, serving as a special master, assisting in pretrial or discovery proceedings in civil and criminal actions, and conducting a "preliminary review" of applications for posttrial relief in criminal cases "as to whether there should be a hearing." Pub. L. No. 90-578, Tit. I, § 101, 82 Stat. 1113 (1968).

In response to *Wingo* v. *Wedding*, 418 U.S. 461 (1974), in which this Court held that the "additional duties" subsection did not authorize magistrates to conduct, as opposed to recommend, a habeas corpus evidentiary hearing, Congress rewrote subsection "b". The 1976 amendment explicitly set forth the magistrate's range of pretrial and posttrial duties, § 636(b)(1)(A)-(B)(1982), but did not substantially alter his limited criminal trial jurisdiction. In addition, the amendment retained an identical "additional duties" clause, but placed it in a separate subsection, § 636(b)(3).

Finally, in 1979, Congress added new subsection "c", authorizing magistrates, with the parties' consent, to try any civil case, jury or non-jury. It also amended 18 U.S.C. § 3401(a), reproduced at Pet. A. 1-2, to permit magistrates, with the defendant's consent, to conduct criminal jury trials, but limited such jurisdiction to misdemeanors.

B. Delegation Of Felony Jury Selection Is Inconsistent With The Entire Statutory Scheme Enacted By Congress In The Federal Magistrates Act.

1. The Statute Specifically Excludes Magistrates From Conducting Felony Trials, As To Which Congress Understood Jury Selection To Be An Integral Part

"[A] section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369

U.S. 1, 11 (1962). A single sentence cannot control where it is inconsistent with "the provisions of the whole law, . . . its object and policy." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Richards* v. *United States*, *supra*; *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 286 (1956). "[W]ords of general meaning" should not be literally applied in contravention of the balance of the legislation or the demonstrable intentions of the drafters. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892). *See generally* 2A Sutherland, *Statutory Construction* § 46.05 (4th ed. 1984).

Consistent with these principles, in *Wingo* v. *Wedding*, *supra*, the Court declined to uphold the assignment to a magistrate of a habeas corpus hearing under the 1968 Act's "additional duties" clause because the balance of the statute implicitly precluded such a delegation of authority. The Act expressly authorized magistrates to recommend "*whether* there should be a hearing," thereby "compel[ling] the conclusion that Congress made a deliberate choice to preclude district courts from assigning magistrates the duty to hold evidentiary hearings." 418 U.S. at 472 (emphasis added), construing 28 U.S.C. § 636(b) (1968 version). The Court noted, "Where Congress gave magistrates authority to conduct hearings, the authority was express and circumscribed with procedural safeguards." *Id.* at 470 n.11.

The history and structure of the Act compel the same conclusion regarding felony jury selection: Congress did not intend the "additional duties" clause to authorize magistrates to conduct this procedure, which Congress understood to be the first phase of trial, with or without *de novo* review. Congress originally decided in 1968 to limit magistrates' criminal trial jurisdiction to certain misdemeanors, which it termed "minor" offenses, after a vigorous legislative debate about the constitutionality of even this limited trial jurisdiction. However, Congress concluded that "it is constitutionally permissible to entrust the trial of minor offenses to U.S. magistrates *under the conditions set forth in S. 945* (emphasis added)."

H.R. Rep. No. 1629, *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4264 [hereinafter "1968 House Report"]. The conditions included limiting such jurisdiction to "minor" crimes (misdemeanors) and requiring the defendant's consent.[8]

Congress did not contemplate extending magistrates' limited trial authority to felonies. It understood that a defendant's Art. III and due process claims were far stronger in the felony context. The bill's principal sponsor, Sen. Tydings, calmed a representative's fear that the bill might be construed to empower magistrates "to try felonies" by responding: "No. Absolutely not, but, as I say, the Constitution and the laws of the United States preclude that." *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 88 (1968) [hereinafter "1968 House Hearings"]. Similarly, a Senate subcommittee staff memorandum observed: "When a crime reaches a certain level of seriousness, the Constitution guarantees the accused that the trial be by jury, before an Article III judge." *Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 16 (1966) [hereinafter "1966 Senate Hearings"].

Subsequent amendments to the Act reinforced the Congressional intent to exclude felony trial proceedings from the jurisdiction of magistrates. In 1976, while concentrating on the reconstruction of § 636(b), Congress did not expand magistrates' criminal trial jurisdiction. H.R. Rep. No. 1609, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6168 (hereinafter "1976 House Report"). In 1979, Congress amended 18 U.S.C § 3401(a) to authorize magistrates to conduct misdemeanor jury trials, and created civil jury trial jurisdiction, 28 U.S.C. § 636(c), in both cases requiring consent. Congress added no statutory language, and otherwise expressed no intent, to give magistrates any felony trial jurisdiction.

In circumscribing the criminal trial jurisdiction of magistrates to crimes less serious than felonies, Congress must have intended to preclude magistrates from exercising jurisdiction to select felony juries. Congress is presumed to act with awareness of constitutional precedent, statutory rules, and current practice. *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987); *Lorillard* v. *Pons*, 434 U.S. 575, 581-82 (1978). Prior to the 1976 amendments, the Court had consistently viewed jury selection as part of the "trial." *See, e.g., Ristaino* v. *Ross*, 424 U.S. 589, 595 (1976) (*trial* judge plays critical role during jury selection to protect the defendant's Sixth Amendment right to an "impartial jury"); *Ham* v. *South Carolina*, 409 U.S. 524, 528 (1973) (same); *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) (peremptory challenge process "is a necessary part of trial by jury"); *Frank* v. *Mangum*, 237 U.S. 309, 338-39 (1915) (defendant's right to be present at *trial* begins with jury selection); *Diaz* v. *United States*, 223 U.S. 442, 455 (1912) (same); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-15, (1899) ("trial by jury" includes a "'a body of twelve men . . . *duly empanelled under the direction of a competent court* . . .' [citation omitted]") (emphasis added). *Cf. Downum* v. *United States*, 372 U.S. 734,

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[8] Assistant Attorney General Fred M. Vinson, Jr., in influential testimony, opposed expanding the commissioners' existing petty offense trial jurisdiction on Art. III grounds, even with consent. *Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 109 (1966). Subsequently, the legislation's principal sponsor, Sen. Tydings, reiterated the importance of consent to avoid Art. III and due process problems. *Federal Magistrates Act: Hearings before Subcomm. No.4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 72-73 (1968).

During extensive floor debate, Rep. Poff countered Rep. Cahill's forceful argument that the magistrates' minor offense jurisdiction would be unconstitutional, stressing "[t]he intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case . . . ." 114 Cong. Rec. 27,342 (1968).

737 (1963) ("discontinuation" of trial before opening statements violated defendant's double jeopardy rights, which attached when jury was sworn).

Reflecting this case law, the Federal Rules of Criminal Procedure, effective March 21, 1946, had included the provisions pertaining to jury selection, Rules 23 and 24, within the chapter entitled "Trial." *See also* Fed. R. Crim. P. 43(a) (defendant's presence required "at every stage of the trial *including* the impaneling of the jury") (emphasis added). In sum, Congress must have understood its limitation of magistrates' felony trial jurisdiction encompassed jury selection for such trials.

The statute's comprehensive trial jurisdiction provisions, reflecting extensive Congressional consideration and reconsideration, "established the exclusive method for the exercise of such jurisdiction and power by a federal magistrate." *Wimmer* v. *Cook*, 774 F.2d 68, 73 (4th Cir. 1985) (civil trials).[9] As in *Wingo* v. *Wedding*, Congress' omission of jury selection from this jurisdictional structure "illuminated" its purpose not to authorize magistrates to conduct this important function. *United States* v. *Ford*, 824 F.2d 1430, 1437 (5th Cir. 1987) (en banc), *cert. denied*, ___ U.S. ___, 108 S.Ct. 741 (1988).

Congress' purpose is further "illuminated" by its failure to provide any framework for district court review of magistrate-conducted felony jury selection. Where Congress authorized magistrates to exercise trial jurisdiction, it specifically provided for Art. III appellate review. *See* 18 U.S.C. § 3402; 28 U.S.C. § 636(a)(3), (c)(3)-(5). Where it authorized magistrates to hear substantive pretrial or posttrial matters, it similarly required review, linking the comprehensiveness of the review to the importance of the procedure. Thus, magistrates may

[9] *See Hall* v. *Sharpe*, 812 F.2d 644, 648 (11th Cir. 1987) (exclusive source of authority for magistrates to conduct civil trials is now § 636[c]); *In re Wickline*, 796 F.2d 1055, 1056-59 (8th Cir. 1986) (same); *see also Banks* v. *United States*, 614 F.2d 95, 97 (6th Cir. 1980) ("additional duties" clause did not authorize referral of a probation revocation hearing).

enter an order "determin[ing]" *non-dispositive* pretrial matters, subject to review by a deferential "clearly erroneous or contrary to law" standard, § 636(b)(1)(A); but they may only "recommend" determination of *dispositive* pretrial and post-trial applications, subject to *de novo* review. § 636(b)(1).[10] The only functions carrying no provision for district court review are essentially ministerial or otherwise far removed from trial, such as administering oaths, taking depositions, or fixing bail, § 636(a)(1)-(2)—and the "additional duties" under § 636(b)(3). Congress would not have established this comprehensive review structure only to authorize felony jury selection as one of these unspecified "additional duties" with "*no* provision for review." *United States* v. *Ford*, 824 F.2d at 1437 (emphasis in original).

The conclusion below that Congress intended to authorize assignment of jury selection with *de novo* review is still further contradicted by the statute's limited authorization for such review. The statute authorizes *de novo* review only for the eight dispositive pretrial or posttrial applications specifically listed in § 636(b)(1)(B). The 1976 amendment that incorporated this provision into the Act was intended to "emphasize[] and clarif[y] when a de novo determination must be made by the judge." 1976 House Report, *supra*, at 3, 1976 U.S. Code Cong. & Admin. News at 6163. To permit district judges to exercise *de novo* review at their whim defeats Congress' purpose to

[10] Congress could not have understood felony jury selection to fall under § 636(b)(1), which pertains to "any pretrial matter" and certain posttrial applications. Jury selection is not among the eight "dispositive" motions for which a magistrate may "recommend" decision subject to review. *Hall* v. *Sharpe*, 812 F.2d 644, 647 (11th Cir. 1987); § 636(b)(1)(B). On the other hand, no court has held that Congress intended to equate felony jury selection with the remaining pretrial matters magistrates may "determine," subject to review only by a "clearly erroneous or contrary to law" standard. "Subparagraph (A) [is] plainly intended for less important matters than voir dire." *United States* v. *Trice*, *supra*, 864 F.2d at ___, slip op. at 12-15.

clarify when such a standard should be employed. In this regard, the courts may not remake a statute to save its constitutionality by inserting a procedural safeguard that Congress chose to omit. *Crowell* v. *Benson*, 285 U.S. 22, 77 (1932) (Brandeis, J., dissenting). This is a "subject . . . for legislation —not adjudication." *Fuentes* v. *Shevin*, 407 U.S. 67, 96-97 (1972) (legislature, not courts, must promulgate hearing procedure to save constitutionality of statute authorizing prejudgment replevin).

By construing the general language of § 636(b)(3) to override the balance of this carefully-structured, oft-amended, comprehensive statute, the Second Circuit rendered Congress' laborious efforts "superfluous." *United States* v. *Ford*, 824 F.2d at 1438. Under its reasoning, "the additional duty language was all that was necessary. Fairly read in context, Congress never intended that this language swallow all that preceded it." *Id.*[11]

[11] Although the Administrative Office of the United States Courts lists *voir dire* as an "additional duty" authorized by § 636(b)(3), *Legal Manual for Magistrates* 3-15 (January 1983 ed.), the manual also notes, in a section entitled "Limitations Upon a Magistrate's Jurisdiction," that because "Title 18 U.S.C. § 3401 *specifically limits* a magistrate's trial jurisdiction in criminal cases to misdemeanors, a magistrate has no jurisdiction to try felony cases, even upon consent . . . . Accordingly, a magistrate's authority in a felony case is limited to: (1) the conduct of initial proceedings under 28 U.S.C. § 636(a); and (2) the conduct of other proceedings on reference from a district judge under 28 U.S.C. § 636(b) [footnote omitted]." *Id.* at 3-19 (emphasis added). Significantly, the footnote then states: "A magistrate, for example, should *not* substitute for a judge at trial proceedings in criminal cases." *Legal Manual* at 3-19 n.52 (emphasis added), citing *United States* v. *Boswell*, 565 F.2d 1338 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978) (magistrate presided during summations due to judge's illness). If jury selection is part of the trial, it is difficult to reconcile this analysis with the manual's approval of *voir dire* delegation, unless such approval was meant to apply only to civil cases.

2. The Legislative History Shows That Congress Intended 'Additional Duties' To Include Routine, Non-Adjudicative Tasks, Not Jury Selection

During the legislative debate concerning the 1968 Act, Sen. Tydings, the principal sponsor, explained that the "additional duties" subsection was intended to "eas[e] some of the *routine nonjudicial burdens* of [district] courts. . . . [U]se of magistrates as aides to judges in such matters is sure to increase the time available to those judges for the *careful and unhurried performance of their traditional adjudicatory duties.*" 1968 House Hearings, *supra*, at 73 (emphasis added). Similarly, during the extensive House floor debate, Rep. Poff, a strong proponent of the legislation, answered an opponent's concern that the "additional duties" subsection would constitute "an improper and vague delegation of legislative power to the courts" as follows:

> [A]s a *matter of legislative history*, I would like to emphasize that the subcommittee raised that question during its intensive study of this bill and *it was agreed that this section was not in any way intended as the predicate for expanding the jurisdiction of the magistrate.*

114 Cong. Rec. 28,360-61 (1968) (emphasis added).[12]

The court of appeals' statutory analysis relies upon the legislative history of the 1976 amendment to support its conclusion that, in 1976, Congress intended an identically-worded "additional duties" clause to be a far broader grant of authority than

[12] This explanation was consistent with the House Report, which explained that the three listed "additional duties" were "intended to illustrate the general character of duties assignable to magistrates under the act . . ." 1968 House Report, *supra*, 1968 U.S. Code Cong. & Admin. News at 4262. The three duties—serving as a special master in certain civil actions, "assisting" in pretrial or discovery proceedings, and reviewing postconviction petitions—were limited in scope and/or preliminary to a criminal trial. They did not suggest any intent to enhance the magistrate's jurisdiction beyond the scope of the balance of the statute.

in 1968. The court quoted committee reports which stated that Congress had placed the "additional duties" clause in a separate subsection, in contrast to the 1968 Act, to emphasize that the provision was "not restricted in any way by any other specific grant of authority to magistrates." *United States* v. *Garcia*, 848 F.2d at 1329, J.A. 28-29, quoting 1976 House Report, *supra*, at 12, 1976 U.S. Code Cong. & Admin. News at 6172; S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976). In addition, the reports stated:

> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

Id., quoted in *United States* v. *Garcia*, *supra*.

However, the balance of these reports, which the court omitted, makes clear that Congress, as in 1968, wanted the courts to "experiment" with assigning "routine, non-adjudicative duties," not "traditional adjudicatory duties" such as felony jury selection. The purpose of the 1976 amendments also was to *clarify* the magistrates' "additional duties," not to create a more ambiguous grant of authority than the statute already contained.

Thus, the reports explained that the bill was intended to "clearly defin[e] the additional duties" assignable under existing subsection "b", which contained ambiguous language that several courts had narrowly construed.[13] 1976 House Report, *supra*, at 7-8, 1976 U.S. Code Cong. & Admin. News at 6167-68; *see* 1976 House Report, *supra*, at 2 ("clarify and further define"). These clearly-defined duties were to include disposing of "minor and petty criminal offenses," conducting

[13] *See, e.g., Wingo* v. *Wedding*, 418 U.S. 461 (1974); *Ingram* v. *Richardson*, 471 F.2d 1268 (6th Cir. 1972) (magistrate could not review an administrative denial of social security benefits and make proposed findings of fact and conclusions of law); *T.P.O., Inc.* v. *McMillen*, 460 F.2d 348 (7th Cir. 1972) (magistrate could not decide certain dispositive civil motions subject to the district court's review).

"preliminary or pretrial processing of both criminal and civil cases," and hearing "dispositive motions and evidentiary hearings." *Id.* at 5. Congress' overall intent was no different than in 1968: to "assist the district judge in a variety of *pretrial and preliminary* matters thereby facilitating the *ultimate and final exercise of the adjudicatory function at the trial of the case.*" *Id.* at 7 (emphasis added).

While the reports then explained, as the court of appeals noted, that the "additional duties" clause had been placed in a separate subsection so as to "emphasize[] that it is not restricted in any way by any other specific grant of authority to magistrates," *id.* at 12, the reports adopted verbatim, *see supra* at 19, Sen. Tydings' language in 1968 explaining the limited nature of the experimentation Congress had in mind:

> This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more *administrative functions* to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.
>
> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the *careful and unhurried performance of their vital and traditional adjudicatory duties*, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

Id. (emphasis added).

Thus, Congress in 1976 intended the "additional duties" authorized by § 636(b)(3) to be essentially ministerial or non-adjudicative. *United States* v. *Ford*, 824 F.2d at 1438 ("additional duties" clause is a "residuum" that does not authorize delegation of tasks "that Congress never envisioned would be delegated"); *Hall* v. *Sharpe*, 812 F.2d 644, 648 (11th Cir. 1987) ("procedural and administrative matters"); *United States* v.

Curry, 767 F.2d 328, 330 (7th Cir. 1985) ("mostly . . . routine duties") *Banks* v. *United States*, 614 F.2d 95, 97 (6th Cir. 1980) ("procedural and administrative matters"). Congress' purpose remained, as Sen. Tydings had explained in 1968, to free district judges to perform their "traditional adjudicatory duties" —the trial of cases, especially felony cases—not to assign such duties to magistrates. The court of appeals' construction of the clause as an unlimited grant of primary authority conflicts with Congress' express intent to "clarify" the "additional duties" authorized by former, ambiguous § 636(b).

Finally, Congress' intention that § 636(b)(3) authorize district judges to delegate minor, administrative duties, as opposed to substantive, adjudicatory functions, is further demonstrated by Congress' differentiation in its use of key statutory language. Intending a broad grant of jurisdiction to magistrates over "any pretrial" and certain posttrial matters, Congress prefaced § 636(b)(1) with the explanation that such duties were authorized "[n]otwithstanding any laws to the contrary." In contrast, it omitted such a jurisdictionally-enhancing clause in § 636(b)(3), directing, to the contrary, that "additional duties" were not to be "inconsistent with the . . . laws of the United States." Congress is presumed to act purposefully in the "disparate inclusion or exclusion" of particular language in different sections of the same act. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The language and history of the statute demonstrate that Congress acted purposefully here.

3. Congress' Failure In 1976 To Override The Existing Practice That District Judges Preside At Jury Selection Confirms That The Act Does Not Permit Delegation Of Jury Selection To Magistrates

Congress presumably was aware, prior to the 1968 Act, that district judges always presided at jury selection, but it did not manifest any intention to alter this uniform practice. A nationwide study had documented that, as of 1960, district judges presided over *voir dire* in all but two districts, the Eastern and Western Districts of Pennsylvania, where the judge remained

available to resolve disputes but was not necessarily present during the entire *voir dire*. Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 466-67 (1960). However, reported cases made clear that, even in these two districts, judges did not absent themselves unless the defendant explicitly or implicitly consented, *see Haith* v. *United States*, 231 F. Supp. 495, 498 (E.D. Pa. 1964), *aff'd*, 342 F.2d 158 (3d Cir. 1965), and, in any event, the Third Circuit then forbade the practice irrespective of waiver. *Stirone* v. *United States*, 341 F.2d 253, 256 n.3 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965); *United States* v. *Woods*, 364 F.2d 481, 483 (3d Cir.), *cert. denied*, 395 U.S. 972 (1966) ("the voir dire examination is an integral, vital element of a fair trial"). Thus, by 1968, the trial judge presided at *voir dire* in every federal court.

In amending the Magistrates Act in 1976, Congress adopted legislation that the Judicial Conference had proposed. *Jurisdiction of United States Magistrates: Hearing Before the Senate Subcomm. on Improvement in Judicial Machinery of the Comm. on the Judiciary*, 94th Cong., 1st Sess. 1 (1975) [hereinafter "1975 Senate Hearings"]. But the Judicial Conference itself, consistent with the universal practice, had omitted jury selection from the "additional duties" it authorized magistrates to perform in a comprehensive Administrative Office memorandum distributed to all district judges and magistrates in 1975, and reprinted in the legislative record. 1975 Senate Hearings, *supra*, at 22-26.[14]

Faced with this narrow interpretation of the existing law, Congress did not indicate anywhere during its consideration of the 1976 amendments that it disapproved of the Administrative Office/Judicial Conference view or intended to alter the existing practice. This is "persuasive evidence" that the admin-

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[14] While the Administrative Office presently lists "jury selection" as an "additional duty," its discussion elsewhere of magistrates' limited criminal trial jurisdiction suggests that it may have had *civil* jury selection alone in mind. *See supra* at 18 n.11.

istrative interpretation "is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) ("*Schor*").[15]

Indeed, the 1976 revision did not even permit magistrates to preside at jury selection during *misdemeanors*, let alone felonies. Congress that year did not materially revise 18 U.S.C. § 3401, which required misdemeanor defendants to waive their right to a jury trial in order to be tried by a magistrate. Thus, if the court of appeals is correct, Congress in 1976 authorized magistrates to select *felony* juries over the defendant's *objection*, but prohibited magistrates from selecting *misdemeanor* juries with the defendant's *consent*. Congress' view that an accused felon has a greater claim to an Art. III adjudication

[15] The only trial function included on the Administrative Office's list was "[a]cceptance of jury returns in the absence or disability of the trial judge" in *civil* proceedings. 1975 Senate Hearings, *supra*, at 24-25. The House Report listed this function as a possible "additional duty" under 636(b)(3), but did not make clear whether it too was referring only to civil cases. 1976 House Report, *supra*, at 12, 1976 U.S. Code Cong. & Admin. News at 6172. However, this must have been its intent, since Fed. R. Crim. P. 25(a) requires that another "judge" finish a criminal trial when the original judge becomes disabled. In any event, the House Report stated that such a function, which is far more routine and ministerial than jury selection, should be performed only when the trial judge is "unavailable." *Id.*

Similarly, the House Report referred favorably to a statement by Chief Judge Belloni, District of Oregon, in which he discussed the various functions a magistrate in his district had performed. 1976 House Report, *supra*, at 9, 1976 U.S. Code Cong. & Admin. News at 6169, citing 1975 Senate Hearings, *supra*, at 39-40. One function the judge had mentioned was jury selection. 1975 Senate Hearings, *supra*, at 39. However, the House Report's favorable reference to Chief Judge Belloni's statement was in its discussion of *pretrial* matters. It did not make any reference to his views in its discussion of the 'additional duties" clause. 1976 House Report, *supra*, at 9. In addition, while the judge's discussion was ambiguous, he appeared to be referring to civil cases, and where "the lawyers stipulate." 1975 Senate Hearings, *supra*, at 39.

than a misdemeanor defendant makes such an intent inconceivable.[16]

C. Delegation Of Jury Selection Over A Defendant's Objection Is 'Inconsistent' With Fed. R. Crim. P. 24(a) And The Jury Selection And Service Act, Which Require The 'Court' To Preside Over Jury Selection

In *Wingo* v. *Wedding*, 418 U.S. at 468-69, 472, the Court invalidated the assignment to a magistrate of a habeas corpus hearing on the additional ground that such an assignment was "inconsistent," under the "additional duties" clause, with the Habeas Corpus Act, which required such hearings to be conducted by "[t]he court, or justice, or judge." *Id.* at 466-67, citing Rev. Stat. § 761, 28 U.S.C. § 461 (1940 ed.) Delegation of jury selection to a magistrate is similarly "inconsistent" with federal rules and statutes that assign exclusive authority to the "court" to preside over jury selection. Therefore, the district court below had no authority under § 636(b)(3) to assign jury selection to a magistrate.

Fed. R. Crim. P. 24(a), reproduced at Pet. A. 4, authorizes the examination and challenge of jurors in the presence of the "court." The Supreme Court promulgated this rule in 1944.[17] The Federal Rules of Criminal Procedure have the effect of law. *Marion* v. *United States*, 404 U.S. 307, 319 (1971) (dictum); *United States* v. *Hvass*, 355 U.S. 570, 575 (1958) ("[t]he phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes [federal rules]"); 18 U.S.C. § 3771 (1982).

[16] While the 1979 amendment empowered magistrates to conduct jury trials in misdemeanor cases with the parties' consent, this does not reflect upon the drafters' intent in 1976, which was the sole basis for the court of appeals' expansive construction of § 636(b)(3).

[17] Order of December 26, 1944 (eff. March 21, 1946), pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688, 18 U.S.C. § 686 (current version at 18 U.S.C. § 3771 (1982)).

The rule's use of "court" clearly refers to district judges. The position of magistrate did not exist when this rule was promulgated. No rule or practice allowed commissioners to preside at jury selection. *See generally Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931). None of the Court's precedents contemplated anyone other than the district judge presiding during *voir dire*. *See, e.g., Connors* v. *United States*, 158 U.S. 408, 413 (1895) (*voir dire* "inquiry is conducted under the supervision of the *court* . . . [and] must, of necessity, be left to its sound discretion) (emphasis added); *see supra* at 15-16.

Fed. R. Crim. P. 1 ("Scope"), reproduced at Pet. A. 4, states that the rules apply to "all criminal proceedings in the *courts* of the United States" (emphasis added), but only apply to *magistrates* when "specifically provided in one of the rules." Rule 24(a) does not so provide. The same distinction is made in Rule 54, reproduced at Pet. A. 4, which does not include "magistrate" within its definition of "district court." The 1972 Advisory Committee Notes to Rule 54 explain that "Judge of the United States . . . is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act." 18 U.S.C.A. Rule 54 (West 1976) at 626. *Compare* Fed. R. Evid. 1101 ("[t]he terms 'judge' and 'court' *in these rules* include . . . United States magistrates") (emphasis added).

Meanwhile, the Jury Selection and Service Act of 1968, adopted shortly before the Magistrates Act by the same Congress, defines "court" as "courts constituted under chapter 5 of title 28 . . ." Pub. L. No. 90-274, § 101, 82 Stat. 61 (March 27, 1968) (current version at 28 U.S.C. § 1869(f)(1982)). Tit. 28, Chapt. 5, § 132(b), in turn states:

> § 132. *Creation and composition of district courts*
>
> * * *
>
> (b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court. . . .

The Jury Selection and Service Act permits a criminal defendant to challenge the selection of the petit jury before the

voir dire examination, or within seven days after the defendant discovers appropriate grounds—in the "court." 28 U.S.C. § 1867(a). It does not permit such a challenge to be made to a magistrate. *See also* 28 U.S.C. § 451 (defining "court of the United States" to include only Art. III, life-tenured judges).

While the 1976 amendments to the Magistrates Act were intended in part to "overrule" *Wingo* v. *Wedding* by explicitly authorizing magistrates to conduct habeas corpus hearings "[n]otwithstanding any provision of law to the contrary," *see* § 636(b)(1), Congress omitted such language in § 636(b)(3), instead retaining the "not inconsistent with" jurisdictional limitation. In 1979, Congress enhanced the magistrates' new consent civil trial jurisdiction with an identical "notwithstanding" clause, but left § 636(b)(3) alone. Thus, a law's use of "court" or "judge" does not preclude a magistrate from handling the broad range of duties authorized by § 636(b)(1) or (c), but it does preclude an inconsistent delegation under the "additional duties" subsection. Since the assignment of jury selection to a magistrate in this case was "inconsistent" with the above "laws of the United States," it exceeded the scope of § 636(b)(3).

D. The Statute Should Be Construed To Avoid Serious Constitutional Doubts

Federal statutes should be construed so as to "avoid serious doubt of their constitutionality." *Schor*, 478 U.S. at 841, *quoting Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *Crowell* v. *Benson*, 285 U.S. at 62. Where serious doubts are present, "a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided." *Schor, supra*, quoting *Crowell* v. *Benson, supra*. On the other hand, a court may not "ignore the legislative will in order to avoid constitutional adjudication . . ." *Schor, supra*.

As we discuss in Points II and III, *infra*, and as Congress surely believed, delegation of felony jury selection to a magistrate over objection raises serious constitutional questions. *United States* v. *Ford*, 824 F.2d at 1436-37. Surely it is "fairly possible" to construe this statute to avoid these doubts. As

demonstrated above, the court of appeals' construction is compelled by neither the Act's language nor its history. The remainder of the statutory scheme would be unaffected. Meanwhile, the Court would avoid stepping onto the "slippery slope" of determining which, if any, trial functions may be delegated under the statute and the Constitution.

In applying this principle, the Court need have no apprehension that it would thwart the legislative intent. Prior to adopting the legislation in 1968, Congress itself repeatedly stressed an overriding purpose to avoid creating constitutional conflict. *See generally TPO, Inc.* v. *McMillen*, 460 F.2d 348, 352-54 (7th Cir. 1972) (Congress required consent before magistrates could exercise any trial jurisdiction to avoid constitutional conflict); discussion *supra* at 14-15. Congress' similar wariness during 1976 and 1979 was reflected in its continuation of the consent requirement in petty offense cases and its extension of it to civil trials.[18]. The "additional duties" section itself precludes assignment of duties "inconsistent with the Constitution." § 636(b)(3).

E. Because The Jury That Convicted Petitioners Was Selected By A Magistrate Who Had No Statutory Authority To Do So, The Convictions Must Be Reversed

The jury that convicted petitioners was selected by a judicial officer not empowered by Congress to do so, and therefore lacking jurisdiction to act. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245, (1845) (Congress possesses "the sole power of creating the tribunals . . . and of investing them with jurisdiction"); 18 U.S.C. § 3231 (1982). Petitioners objected to this procedure on precisely this ground. This was no trivial defect: jury selection is critical to a criminal defendant's constitutional right to trial by an impartial jury. *See* Points II and III, *infra*. Congress was careful to limit the jurisdiction of magistrates precisely because it did not want district courts to assign functions that, for reasons of constitutional requirements or essential fairness, must be conducted by an Art. III court.

In *Wingo* v. *Wedding*, 418 U.S. at 467, the Court upheld the reversal of a district court judgment denying a defendant's habeas corpus petition, without any analysis of the underlying evidence or "harmless error," because the magistrate had no statutory authority to conduct the hearing. The same reasoning applies here. *See United States* v. *Trice*, 864 F.2d 1421 (criminal conviction reversed where magistrate presided at jury selection subject to *de novo* review).[19]

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[18] Judge Charles Metzner, representing the Judicial Conference, explained that proposed § 636(b)(1)(B), which Congress adopted, would permit magistrates only to "recommend," not "determine," pretrial matters "to avoid . . . possible constitutional objection . . ., [a]lthough there is respectable authority that finds congressional power sufficient to avoid any constitutional objection . . ." 1975 Senate Hearings, *supra*, at 6 (emphasis added). In 1979, Congress retained the consent requirement for trials of "petty offenses" even though it apparently believed consent was *not* constitutionally required. S. Rep. No. 74, 99th Cong., 1st Sess. 6 (1979).

[19] *See also Hall* v. *Sharpe*, 812 F.2d 644 (11th Cir. 1987) (judgment reversed where magistrate lacked statutory authority to conduct civil trial); *Wimmer* v. *Cook*, 774 F.2d 68 (4th Cir. 1985) (same); *United States* v. *Curry*, 767 F.2d 328 (7th Cir. 1985) (judgment revoking defendant's probation reversed where magistrate lacked statutory authority to hold hearing); *Banks* v. *United States*, 614 F.2d 95 (6th Cir. 1980) (same). While *United States* v. *Rodriguez-Suarez*, 856 F.2d 135, 139 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 875 (1989), held that the magistrate's selection of the jury was harmless absent a specific claim of prejudice, the decision does not indicate whether the defendants there, like here, had objected in the district court. Moreover, as we discuss *infra* at 45-46, *Chapman* v. *California*, 386 U.S. 18 (1967), does not apply to this type of error going to the authority of the tribunal to act or to the inherent impartiality of the jury selection process.

II. ART. III DOES NOT PERMIT A MAGISTRATE TO CONDUCT JURY SELECTION IN A FELONY TRIAL OVER THE DEFENDANT'S OBJECTION

A. Petitioners Had A Personal Right Under Art. III Of The Constitution To The Presence Of The District Judge During The Jury Selection Phase Of The Trial

1. The Right To 'Trial By Jury' Under Art. III And The Sixth Amendment Includes A Right To Trial Before An Art. III Judge

Art. III of the Constitution, reproduced at Pet. A. 1, mandates that judges exercising the "judicial Power of the United States . . . shall hold their Offices during good Behavior" and receive "Compensation which shall not be diminished during their Continuance in Office." §1. This "judicial Power shall extend to all Cases . . . arising under this Constitution [and] the Law of the United States . . ." §2. Finally, Art. III requires that "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." §2, ¶3.

In *Schor*, the Court recognized that Art. III confers upon a litigant a "*personal right*" to "an impartial and independent federal adjudication of claims within the judicial power of the United States." 478 U.S. at 848 (emphasis added). *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) ("basic constitutional protections designed in part for the benefit of litigants"); *United States ex rel Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) (Art. III entitles ex-serviceman to the "safeguards afforded those tried in the regular courts"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1922) (persons invoking a constitutional benefit of citizenry "are entitled to a judicial determination of their claims"); *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537, 541 (9th Cir.) (*en banc*) (opinion by now-Justice Kennedy) ("personal right . . . to demand Article III adjudication of a civil suit") ("*Pacemaker*"), *cert. denied*, 469 U.S. 824 (1984). This right presumes the presence of an Art. III judicial officer: a judge whose ability to be "impartial and independent" is secured by lifetime tenure and an irreducible salary. *Northern Pipeline Construction Co.* v. *Marathon*

Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion) ("*Northern Pipeline*"). A magistrate is not such an officer. *United States* v. *Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting).

Art. III protects the individual litigant by insulating the judicial officer exercising the judicial power from potential interference by a coordinate branch of government. *Schor*, 478 U.S. at 848; *Northern Pipeline*, 458 U.S. at 58-60. Its tenure and salary provisions also allow the judge "to guard the Constitution and the rights of individuals from . . . the people themselves." Federalist No. 78 (Hamilton) (New American Library ed. 1961). "Article III's salary and tenure provisions promote impartial adjudication by placing the judicial power of the United States 'in a body of judges insulated from majoritarian pressures and thus able to enforce [federal law] without fear of reprisal or pubic rebuke.' *United States* v. *Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting)." *Schor*, 478 U.S. at 860 (Brennan, J., dissenting). *See Pacemaker*, 725 F.2d at 548 (dissenting opinion) ("protection of minorities from the tyranny of the majority," citing 2 J. Story, *Commentaries on the Constitution of the United States* 403 [1973]).

"The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well . . ." *Northern Pipeline*, 458 U.S. at 59 n.10 (plurality opinion). *See Chandler* v. *Judicial Council*, 398 U.S. 74, 84 (1970) (independence from other judges required in "any phase of the decisional function"); *id.* at 136 (Douglas, J., dissenting); *Hastings* v. *Judicial Conference of the United States*, 770 F.2d 1093, 1106-07 (D.C. Cir. 1985) (Edwards, J., concurring) ("the guarantee of independence runs to individual judges as well as to the judicial branch"); *Pacemaker*, 725 F.2d at 549 (dissenting opinion) ("servants . . . only of their consciences . . ." [citation omitted]); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979).

Despite Art. III's insulation of judicial officers from all sources of extraneous pressure through salary and tenure protections, "Article III does not confer on litigants an absolute

right to the plenary consideration of *every* nature of claim by an Article III court." *Schor*, 478 U.S. at 848 (emphasis added). But this statement implies that, depending upon the "nature of claim," a litigant's *right* to "plenary consideration . . . by an Article III court" may be "absolute." *See, e.g., Schor*, 478 U.S. at 853 (where the "nature of the claim" is at the "core" of traditional Art. III judicial power, the Court's examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching"); *Northern Pipeline*, 458 U.S. at 82-83 (where "*constitutional* rights" are being adjudicated, the Court's scrutiny is "far stricter" [emphasis in original]); *Crowell* v. *Benson*, 285 U.S. at 60-61 (judicial power "necessarily extends" to enforce "constitutional rights").

That a personal Art. III right may be absolute is also suggested by *Schor's* recognition that the presence of consent may be "a significant factor" in determining whether an individual's Art. III rights have been violated. *Schor*, 478 U.S. at 849, citing *Northern Pipeline*, *supra*. *Schor* equated consent in such a context to waivers of "other personal constitutional rights that dictate the procedures by which civil and criminal matters *must* be tried." *Schor*, *supra* (emphasis added), citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969) (right to trial); *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968) (trial by jury in criminal cases); Fed. R. Civ. P. 38(d) (trial by jury in civil cases). Each of these rights, absent waiver, is similarly absolute.[20]

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[20] Where an individual, unlike here, has knowingly and voluntarily waived his personal Art. III rights, his sole hope for relief on appeal is to invoke the interests of the Judicial Branch in resisting encroachment upon its independence and powers by the Executive and Legislative Branches. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850-851 (1986). The test *Schor* applied in such a case, where the individual invoked the Judiciary's interests on his own behalf, was a relative one, weighing Congress' constitutional and practical interests in the legislative scheme against the encroachment upon the Judiciary's exercise of traditional Art. III power. This latter analysis presumably does not apply where the individual has *not* consented, but instead invokes his personal Art. III rights. If the same, less rigorous balancing test applied in both contexts, then, as the *Schor* dissent argued, the Court's construction of two distinct analytic frameworks to resolve Art. III claims would make no sense. *See, e.g., Schor*, 478 U.S. at 807 (Brennan, J., dissenting).

The individual's interest in an adjudication by an impartial, fully independent Art. III tribunal is greatest in criminal cases. "There is no doubt" that the Framers envisioned "all criminal matters, with the narrow exception of military crimes," to be at the "protected core" of Art. III. *Northern Pipeline*, 458 U.S. at 70 n.25 (plurality opinion); *see Schor*, 478 U.S. at 853 (the "core" or "ordinary powers of district courts" include "presid[ing] over jury trials or issu[ing] writs of habeas corpus"). Nevertheless, the Framers directly guaranteed in Art. III the right to trial by jury only in *criminal* cases. Hamilton explained:

> . . . I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question.

Federalist No. 83, *supra*, at 499. *See id.* at 508 ("the security of liberty is materially concerned only in the trial by jury in criminal cases").

But even "criminal matters" contain a scale of procedural values, as the Court implicitly recognized in distinguishing between suppression hearings and criminal trials in *United States* v. *Raddatz*, 447 U.S. at 678-79. And at the very pinnacle of the criminal scale is the felony jury trial. "No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984).

The right of trial by jury is the most "priceless" safeguard of individual liberty, *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961), protecting the accused against "the arbitrary exercise of power by prosecutor or judge." *Batson* v. *Kentucky*, 476 U.S. 79, 86 (1986). The right is "so important to liberty of the individual that it appears in two parts of the Constitution," Art. III itself and the Sixth Amendment. *United States ex rel. Toth* v. *Quarles*, 350 U.S. at 16. Surely, as the history and practice in our federal courts establish, *see supra* at 15-16, 22-25, and Congress has explicitly acknowledged, *see* 18 U.S.C. § 3401, an individual felony defendant has an absolute right to trial by jury in the district court.

This right presumes the personal presence of an Art. III district judge.

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an *officer* vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a *trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them* on the law and to advice them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

Capital Traction Co. v. *Hof*, 174 U.S. 1, 13-14 (1899) (emphasis added). In the federal courts, too, jury trials "are under the *constant* superintendence of the trial judge . . . [who is] 'not a mere moderator' but 'is the governor of the trial' . . ." *Crowell* v. *Benson*, 285 U.S. at 61 (emphasis added). Thus, the Federal Rules of Criminal Procedure assign personal direction of every phase of a criminal trial to the "court." *See* Fed. R. Crim. P. 23-31, 33. As noted above, Congress itself codified the "right" of litigants to the personal presence of a district judge. 28 U.S.C. § 636(a)(3), (c); 18 U.S.C. § 3401.

2. The Trial Court's Role During Jury Selection Is So Crucial That No Distinction Under Art. III Can Be Drawn Between Jury Selection And The Evidence Phase Of The Trial

If a federal felony defendant has an absolute, personal right to a trial by jury before an Art. III judge, then surely this right encompasses jury selection. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system." *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion). The right to an impartial jury assures a defendant that he will not be deprived of his life or liberty by a jury predisposed to do so, *Marshall* v. *Jerrico*, 446 U.S. 238, 242 (1980); it is "an indispensable element of a fair criminal trial." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 196 (1981) (Stevens, J., dissenting). The court's discretionary determinations during the jury selection process are as significant as its decisions during the subsequent evidence phase to the defendant's ability to obtain an impartial, independent adjudication. Meanwhile, these determinations are less susceptible to review.

Prior to the statute's enactment in 1968 and amendment in 1976, judicial precedent, rules and practice all required federal judges to personally oversee jury selection in criminal trials. *See supra* at 15-16 and 22-25. Subsequently, the Court held that the public's right to open trial proceedings under the First Amendment included *voir dire*, tracing the historical presence of the trial judge during that stage as far back as the Sixteenth Century. *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 507. In *Batson* v. *Kentucky*, *supra*, and other decisions safeguarding the criminal defendant's right to the unbiased selection of an impartial jury, the Court has continued to presume that jury selection is part of trial and that the *trial* judge or court must be present and actively involved. *See Batson*, 476 U.S. at 122 (*voir dire* part of the "trial phase of our adversary system of justice") (Burger, C.J., dissenting). The lower courts, meanwhile, have all interpreted "trial" under the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, to begin with jury selection.

United States v. *AAA Electrical Co.*, 788 F.2d 242, 246 (4th Cir. 1986) (and cases cited therein).[21]

The fundamental importance of *voir dire* is summarized in *Rosales-Lopez* v. *United States*, 451 U.S. at 188:

> *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. See *Connors* v. *United States*, 158 U.S. 408, 413 (1895). Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts. [footnote omitted]

During *voir dire*, the trial judge must determine whether a prospective juror is biased due to: racial prejudice, *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *Aldridge* v. *United States*, 283 U.S. 308 (1931); ethnic prejudice, *Rosales-Lopez* v. *United States*, *supra;* prior knowledge about the case, *Patton* v. *Yount*, 467 U.S. 1025, 1036-40 (1984); *Irvin* v. *Dowd*, 366 U.S. 717, 727-28 (1961); or other reason, *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 512 (prior victimization by crime). He must determine the appropriate questions for the court or counsel[22] to ask to uncover such bias. *See generally*

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[21] The Court's double jeopardy cases are not to the contrary. They fix the point—the swearing of the jury—at which the trial may not be "discontinued" without implicating a defendant's double jeopardy rights. They do not define jury selection as "pretrial." *See Crist* v. *Bretz*, 437 U.S. 28, 35-36 (1978); *Downum* v. *United States*, 372 U.S. 734, 737 (1963); *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949).

[22] Under Fed. R. Crim. P. 24(a), a federal court may permit the opposing counsel to personally address questions to the prospective jurors. The judge must then be additionally attentive to "control that process to make sure privileges are not . . . abused." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 n.9 (1984). *See, e.g., Thompson* v. *Lynaugh*, 821 F.2d 1054, 1061 (5th Cir.) (prosecutor incorrectly explained law to jurors), *cert. denied*, ___ U.S. ___, 108 S.Ct. 5 (1987).

Ham v. *South Carolina*, *supra*. He must ascertain each juror's ability to understand and apply essential legal principles. *Wainwright* v. *Witt*, 469 U.S. 412, 425-26 (1985). He must strike the appropriate balance between the constitutional presumption favoring a public trial, *see Waller* v. *Georgia*, 467 U.S. 39, 44 (1984); the defendant's right to an impartial jury; and each prospective juror's "significant interest in privacy." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 512-13.

While these functions require the trial judge to focus upon individual jurors, he also must be ever-mindful of the impartiality and qualifications of the prospective jurors as a group. *See, e.g., Batson* v. *Kentucky, supra* (evaluation of prosecutor's alleged pattern of racially-motivated challenges); *Irvin* v. *Dowd, supra* (entire *venire* tainted by pretrial publicity). In performing this function, he may have to evaluate whether to apply a controversial or expensive remedy, such as outright dismissal, change of venue, sequestration of jurors, closure of the entire proceeding, or postponement of the trial. *See, e.g., Batson* v. *Kentucky, supra; Press-Enterprise Co.* v. *Superior Court*, 464 U.S. at 512-13; *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 563-64 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333, 342 (1966).

In each of these areas, the Court has stressed the broad discretion that must be afforded the trial judge. "This is so because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.' *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)." *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976). The judge "must rely largely on his immediate perceptions," *Rosales-Lopez* v. *United States*, 451 U.S. at 189; the juror's "'manner . . . is oftentimes more indicative of the real character of his opinion than his words.'" *Patton* v. *Yount*, 467 U.S. at 1037-38 n.12. Indeed, the Court has equated the trial judge's factfinding role during jury selection with the jury's factfinding role during trial, noting further: "In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses." *Rosales-Lopez*, 451 U.S. at 188.

The Court's landmark decision in *Batson* v. *Kentucky* added further to the trial court's indispensable role. *Batson* requires a judge to first evaluate a prosecutor's alleged racially-discriminary exercise of peremptory challenges by examining any "pattern" of strikes as well as the "prosecutor's questions and statements during *voir dire*." 476 U.S. at 96. If the court finds a prima facie case, it must then subjectively evaluate the credibility of the prosecutor's "neutral explanation." *Id.* at 97. The Court made "no attempt to instruct [state and federal] courts how best to implement [its] holding," *id.* at 99, but instead noted its "confidence that trial judges, experienced in supervising *voir dire*," would make sound judgments, *id.*, to which reviewing courts would be required to give "great deference," *id.* at 98 n.21. The decision thus imposed a "continuing monitoring and recording" requirement "sure to tax even the most capable . . . judges," *id.* at 103 (Burger, C.J., dissenting), while ensuring future litigation to "spell out its contours." *Id.* at 102 (White, J., concurring). In fact, considerable litigation has ensued, characterized by appellate deference to the subjective, discretionary determinations of judges actually present during *voir dire*.[23]

Jury selection is indistinguishable from the balance of the trial for Art. III purposes not only because selection of an impartial jury is essential to a fair trial, but also because the

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[23] Since *Batson*, appellate courts have remanded claims of error for additional factfinding by the trial court in view of the latter's unique position to make largely subjective evaluations of the prosecutor's intent. *United States* v. *Gordon*, 817 F.2d 1538 (11th Cir. 1987), *vacated in part*, 836 F.2d 1312, *cert. denied*, ___ U.S. ___, 109 S.Ct. 28 (1988); *United States* v. *Wilson*, 816 F.2d 421 (8th Cir. 1987); *United States* v. *Allen*, 814 F.2d 977, 978 (4th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 371 (1988), and have otherwise employed a highly deferential standard of review. *See, e.g., United States* v. *David*, 844 F.2d 767, 769 (11th Cir. 1988); *United States* v. *Cloyd*, 819 F.2d 836, 837-38 (8th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2910 (1988); *United States* v. *Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *United States* v. *Woods*, 812 F.2d 1483 (4th Cir. 1987).

trial judge's conduct of the subsequent trial proceedings depends upon his personal knowledge of what occurred during *voir dire*. Evaluation of subsequent taint or misconduct allegations requires the trial judge to consider a juror's behavior and personality as revealed during *voir dire*, as well as the candor of his *voir dire* disclosures.[24] In preparing his charge, in ruling upon a defendant's objection that other-crime, impeachment or co-conspirator hearsay evidence would unfairly prejudice, confuse or mislead the jury, Fed. R. Evid. 403, 404(b), 608(b), 609, in weighing the need for and effectiveness of remedial measures such as limiting instructions, Fed. R. Evid. 105, or a mistrial, Fed. R. Crim. P. 14, the trial judge must rely upon his knowledge of the jurors' intellectual and emotional functioning. His absence during jury selection may affect his control of the trial, and "is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself." *United States* v. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting).

The number, complexity, and importance of the decisions that must be made by the judge presiding over jury selection demonstrate that the security provided by Art. III's lifetime

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[24] In *United States* v. *Hernandez*, 862 F.2d 17 (2d Cir. 1988), the convictions were reversed where the trial court had disqualified the sole juror holding out for acquittal, after four days of deliberations, for nondisclosure of his psychiatric history during *voir dire* and "mental incompetence." In concluding that the district judge should have removed the juror, if at all, earlier in the proceedings before his status as the lone holdout for acquittal emerged, the court of appeals noted that the juror had acted strangely, "winking, smiling and nodding his head at the defendants," during the *voir dire*. *Id.* at 19. *See Smith* v. *Phillips*, 455 U.S. 209, 212 n.4 (1982) (nondisclosure of juror's midtrial employment application to prosecutor's office did not require new trial where trial court had relied upon that juror's detailed *voir dire* disclosure of his general law enforcement background and interest); *see generally Remmer* v. *United States*, 350 U.S 377 (1956) (juror tampering).

tenure and irreducible salary provisions is at least as essential during this stage as during the rest of the trial. In a *Batson*, challenge, the court must determine whether the Executive Branch, through the actions of the prosecutor, is discriminating according to race; sustaining such a grave charge is no easy matter. Less dramatic, but equally subtle decisions concerning an individual juror's fitness to serve can also be influenced by the presiding officer's awareness that the community is "yearning . . . for retribution," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571 (1980), inflamed against a particular defendant or category of crime, *see Wainwright* v. *Witt*, 469 U.S. at 459 (Brennan, J., dissenting), or that the Justice Department is keenly interested in the outcome of the case. If a district judge could assign such critical trial functions to a magistrate despite the inherent insecurity under Art. III of the latter's position, then logically the judge could assign subsequent trial functions as well. This could not have been the Framers' intention under Art. III.[25]

3. The Criminal Defendant's Compelling Interest In Jury Selection By An Art. III Judge Far Outweighs Congress' Minimal Interest In Authorizing Assignment Of This Function To Magistrates

Even if a criminal defendant's personal right under Art. III to have a district judge preside during jury selection is not

[25] The wholesale assignment of criminal trial functions as important as jury selection would seriously weaken the institutional independence of the judiciary in relation to the other branches, thereby reducing the ability of individual litigants to obtain independent decisionmaking. By investing public resources in a magistrate system rather than authorizing additional judgeships, Congress forces overworked Art. III judges to increasingly rely on magistrates to perform traditional adjudicatory functions. The Judicial Conference's inevitable response—creation of additional magistrate positions—in turn "reduces the pressure on Congress to create more Article III judgeships, and increases the pressure on district courts to escalate the use of magistrates." *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d at 549 (dissenting opinion).

absolute, it far outweighs Congress' interest in authorizing delegation of such a procedure to magistrates. In *Northern Pipeline, supra*, the Court observed that Congress had a "minimal" interest in assigning the adjudication of traditional "common law" rights to a "non-Art. III 'adjunct'" and that, where constitutional rights as opposed to "rights created by Congress" are concerned, the Court's scrutiny must be "far stricter." 458 U.S. at 83-84, comparing *United States* v. *Raddatz, supra* (strict scrutiny of delegation to magistrates of authority to conduct pretrial suppression hearings) with *Crowell* v. *Benson, supra* (adjudication of "public rights"). *Northern Pipeline* disallowed delegation of common law claims to non-Art. III bankruptcy courts even though Congress had established these courts pursuant to its Art. I authority to create uniform national laws over bankruptcies. *Cf. Palmore* v. *United States*, 411 U.S. 389 (1973) (upholding Congress' exercise of its unique, Art. I power to establish local, non-Art. III criminal courts in the District of Columbia).[26] In this case, involving adjudication of constitutional rights of the highest order, Congress' interest is far less than in *Northern Pipeline*.

Congress' practical stake in the assignment of felony jury selection to magistrates is no greater than its constitutional interest. Congress did not consider such delegation significant

[26] *Palmore* v. *United States*, 411 U.S. 389 (1973), held that, pursuant to Congress' "plenary Art. I power to legislate for the District of Columbia," Congress could create a local, non-Art. III court to try local cases in the District. *Id.* at 407. While acknowledging that Art. III's requirements "are applicable where laws of national applicability and affairs of national concern are at stake," the Court reasoned that this interest may have to give way in those few instances where Congress has plenary power to legislate "in specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 408. *See Northern Pipeline*, 458 U.S. at 75-76 (narrowly construing *Palmore*). The prosecution here of federal narcotics laws of "national applicability," against which petitioners were entitled to assert their full panoply of federal procedural rights, obviously presents an entirely different case.

enough to mention anywhere in the otherwise comprehensive statutory scheme. The procedure does not further Congress' overriding purpose to free overworked district judges to perform their "traditional adjudicatory duties," since jury selection itself is such a duty. In the majority of cases, federal jury selection takes less than two hours.[27] The minimal, initial savings of the judge's time that such an assignment might achieve would frequently be offset by cumbersome review procedures. *See infra* at 43-45. Perhaps recognizing the lack of utilitarian benefit in (and the inappropriateness of) this process, the district courts have employed it sparingly: only 55 such assignments were made during the six-month period between July 1 and December 31, 1988, the first period such statistics were maintained.[28] By comparison, during the year ending June 30, 1987, magistrates disposed of a total of 466,078 cases and other matters, including 321,029 "additional duties."[29]

The curtailment of this procedure would not interfere in any respect with the magistrates' performance of their other duties under the Act. At the same time, it would avoid spawning an unnecessary, new field of appellate litigation.

B. Delegation Of Felony Jury Selection Violates Art. III Because the Magistrate's Decisionmaking Is Essentially Unreviewable, Regardless Of The District Court's Offer Of 'De Novo' Review

In *Northern Pipeline*, because the non-Art. III bankruptcy courts had "all ordinary powers of district courts," and its

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[27] G. Bermant, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges* 13 (Federal Judicial Center 1977). Of the judges surveyed, 65 percent estimated that *voir dire* is usually completed within one hour; 28 percent estimated that the usual duration is one to two hours (in criminal cases).

[28] Letter dated February 16, 1989, from the Administrative Office of the United States Courts, Magistrates Division, to counsel for petitioners, lodged with the Clerk.

[29] Administrative Office of the United States Courts, Annual Report of the Director 34 (1987).

judgments were subject to review only by a deferential, "clearly erroneous" standard, the Court rejected an "adjunct" rationale for upholding the Act. 458 U.S. at 85. On the other hand, in *Raddatz*, the "critical" basis for the Court's decision to uphold the statutory scheme—despite the "stricter scrutiny" required for constitutional adjudication—was that "'[t]he authority—and the responsibility—to make an informed, final determination . . . remain[ed] with the judge,' 447 U.S. at 682, quoting *Mathews* v. *Weber*, 423 U.S. 261, 271 (1976) . . . ." *Northern Pipeline*, 458 U.S. at 81. In this case, the scrutiny of the district court's review procedure must be even greater than in *Raddatz* because "the criminal law objective of determining guilt or innocence," rather than the defendant's "lesser" interest in a pretrial suppression motion, is involved. *Raddatz*, 447 U.S. at 678-79. Because the district court cannot make an "informed, final determination" when jury selection is conducted by a magistrate, such an arrangement violates Art. III.

The careful statutory scheme that *Raddatz* upheld required the magistrate to provide the district court with specific, proposed findings of fact and conclusions of law. 28 U.S.C. § 636(b)(1). Together with the hearing transcript, these enabled the district judge to independently determine, through a *de novo* review, whether to adopt the magistrate's additional recommendation for the ultimate resolution of the defendant's motion. Following jury selection, however, a magistrate presents the court with a "final determination": a panel of jurors ready to be sworn. The statute prescribes no procedure for or standard of review: no factual or legal findings, no report, not even a transcript.[30]

No reviewing court can properly second-guess the inherently subjective, discretionary, quasi-factual judgments of the

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[30] The local rule cited by the court of appeals was no more specific: it merely authorizes magistrates to exercise whatever jurisdiction is assigned to them under 28 U.S.C. § 636. *United States* v. *Garcia*, 848 F.2d at 1327, J.A. 25, citing E.D.N.Y. Magistrates R. 1, reproduced at Pet. A. 5. The local rules do not mention jury selection, let alone a procedure or standard for review.

voir dire court. *See supra* at 35-40. Thus, an "appeal" *to* a district judge would be no more effective than an appeal *from* a district judge to a court of appeal. Questioning of each juror during *voir dire* is far briefer and more superficial than of a hearing witness, providing the reviewing court comparatively little to review even where, unlike here, a transcript is available. The judge cannot effectively requestion a juror; the initial, relatively spontaneous *voir dire* questioning can never be recreated. *United States* v. *Ford*, 824 F.2d at 1437 ("a delicate exercise at best"); *United States* v. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting) (juror will become defensive); *see, e.g.*, *Patton* v. *Yount*, 467 U.S. at 1039 ("unlike witnesses, prospective jurors have had no briefing by lawyers . . . [and] cannot be expected invariably to express themselves carefully or even consistently").

Moreover, *de novo* review of challenges for cause cannot generally occur because any juror subject to a magistrate's cause determination will have been excused. A defendant will almost invariably exercise a peremptory challenge where the magistrate has denied his cause challenge. Similarly, an erroneous ruling *granting* a prosecutor's cause challenge will permanently deprive the defendant of a potentially favorable juror, while also saving the prosecutor a peremptory challenge.

A court's efforts to correct a magistrate's erroneous ruling would only accentuate the "essentially clerical" view of *voir dire* suggested by the court's original assignment of it to a subordinate judicial officer. *United States* v. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting). This message would be conveyed if the court excused any previously-chosen juror and initiated a new *voir dire* with replacement jurors, requestioned the original jurors, or gave corrected legal instructions. Such repetition of the magistrate's role would also thwart the sole justification for the initial assignment: saving the district judge time for "more important" tasks.

Even if the judge here had offered a more thorough review procedure, *see supra* at 3, he still would have had no choice but to apply an impermissibly deferential "clearly erroneous or

contrary to law" standard. The inherent unreviewability of the magistrate's subjective decisionmaking during *voir dire* requires the district court to accept his credibility determinations. Thus, the only claimed mistake the court can possibly overturn must be clearly apparent and involve legal error. In this sense, the magistrate's powerful role is similar to that which he performs under § 636(b)(1)(A) in deciding non-dispositive, pretrial motions. It was just this type of deferential review that the Court termed an inadequate "facade" in *Northern Pipeline*. 458 U.S. at 85-86. *See also United States* v. *Raddatz*, 447 U.S. at 711-13 (Marshall, J., dissenting). The magistrate's selection of the jury is inherently unreviewable and, therefore, impermissibly "final" under Art. III.

C. The Denial Of Petitioner's Art. III Right To The Presence Of A District Judge During Jury Selection Requires That The Judgment Be Vacated

"Harmless error" analysis would be even less appropriate if the Court found a constitutional violation in addition to a statutory one. *See supra* at pp. 28-29. Under *Chapman* v. *California*, 386 U.S. 18 (1967), "harmless error" analysis "presupposes a trial . . . before an impartial judge and jury." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986), citing *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (due process violated where judge with potential financial conflict of interest tried case despite possibility of "fair" trial). "'[S]ome constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman* v. *California*, 386 U.S. at 23. The right to an impartial adjudicator, be it judge or jury, is such a right." *Gray* v. *Mississippi*, 481 U.S. at 668. Thus, the Court has consistently reversed convictions, regardless of the strength of the prosecution's case, where it found jury selection procedures in violation of due process. *See, e.g.*, *Batson* v. *Kentucky*, *supra* (prosecutor's use of peremptory challenges to exclude blacks); *Ham* v. *South Carolina*, *supra* (failure to inquire during *voir dire* concerning racial prejudice).

Similarly, where the ability to link the violation of a constitutional right to specific prejudice is not possible due to the

inherent subtlety of the potential impact, harmless error analysis has not been applied. *See, e.g., Vasquez* v. *Hillary*, 474 U.S. 254 (1986) (plurality opinion) (racial discrimination in selection of grand jury "undermines the structural integrity of the criminal tribunal itself"); *Waller* v. *Georgia*, 467 U.S. 39, 49-50 (1984) (violation of right to public trial); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (male defendant entitled to new trial due to systematic exclusion of women from state juries); *Peters* v. *Kiff*, 407 U.S. 493, 502-03 (1972) (systematic exclusion of blacks from state grand juries.)

III. ASSIGNMENT OF JURY SELECTION TO A MAGISTRATE OVER A FELONY DEFENDANT'S OBJECTION VIOLATES THE DUE PROCESS CLAUSE REGARDLESS OF THE COURT'S OFFER TO REVIEW '*DE NOVO*' THE MAGISTRATE'S RULINGS ON CHALLENGES FOR CAUSE

"Due process means . . . a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). This is as true during jury selection as during the subsequent phases of the trial. *See supra at* 35-40. Art. III affords federal, but not state, defendants the additional procedural protection that the independence and impartiality of judges who exercise these functions will be enhanced by lifetime tenure and an irreducible salary. This additional constitutional protection creates a liberty interest that cannot be infringed without violating the Due Process Clause. *See generally Vitek* v. *Jones*, 445 U.S. 480, 488-89 (1980).[31]

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[31] While Art. III does not apply to the states, the state cases seem to uniformly hold that a defendant has a right to the presence of the trial judge during jury selection, although some go on to hold that this right may be waived or that prejudice must be shown to warrant reversal. *See, e.g., Carter* v. *State*, 512 So.2d 284 (Fla. Dist. Ct. App. 1987) (conviction reversed); *Hall* v. *State*, 497 N.E.2d 916 (Ind. 1986) (same); *Peri* v. *State*, 426 So.2d 1021 (Fla. Dist. Ct. App. 1983) (same); *Bright* v. *State*, 305 S.W.2d 899 (Tex. Crim. App. 1957) (no reversal absent prejudice); *State* v. *Bolton*, 324 Ill. 322, 155 N.E. 310 (1927) (no reversal where judge's absence was temporary and he could hear proceedings from an anteroom).

Even if, contrary to our discussion in Point II, the interests underlying Art. III do not make this right absolute, petitioners' interest nevertheless was unquestionably compelling. To overcome their interest, the Due Process Clause requires that the government identify weightier, countervailing public or institutional concerns within the framework of the three-part due process analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The components of this analysis are:

> (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve.

Raddatz, 447 U.S. at 677, citing *Mathews* v. *Eldridge*, *supra*.[32]

A criminal defendant's "private interest" in his liberty "is almost uniquely compelling." *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985). The importance under Art. III of having a district judge present during jury selection to safeguard this liberty interest has been fully discussed. *See* Point II, *supra*, at 35-40.

The "risk of an erroneous determination by reason of the process accorded"—the substitution of a magistrate for a judge—is implicit in Art. III. The Framers required that judicial officers exercising the federal judicial power enjoy lifetime tenure and an irreducible salary because otherwise such

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[32] A criminal trial, as opposed to a pretrial suppression hearing, as *Raddatz* itself stressed, involves a far more significant determination of guilt or innocence, and therefore, as discussed in Point II, is at the heart of Art. III. It is questionable whether *Mathews* v. *Eldridge*, which involved a litigant's property as opposed to a liberty interest, should be applied in analyzing the due process required during a criminal trial itself. *See, e.g., Lassiter* v. *Department of Social Services*, 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting) (questioning applicability of *Mathews* v. *Eldridge* where mother's liberty interest in parental rights is at stake). Nevertheless, the Court's decisions involving liberty interests have applied it. *See, e.g., Ake* v. *Oklahoma*, 470 U.S. 68, 77-78 (1985) (states required to provide defendants with psychiatric assistance on insanity issue).

officers would be influenced by the insecurity of their position. But this proposition is impossible to demonstrate in any specific case. To require such proof as a prerequisite for the application of Art. III would read this fundamental protection out of the Constitution. Rather than impose such an impossible burden upon federal litigants, Art. III *presumes* such a connection. This presumption is no less significant during jury selection than during the balance of the trial. *See supra* at 39-40.

The court of appeals did not take issue with the fundamental principle that Art. III requires the decisionmaking power, particularly in a criminal case, to be retained by an inherently-independent Art. III judge. Instead, the court reasoned that the availability of *de novo* review was sufficient to guard against error. But as we also have demonstrated, the magistrate's quasi-factual, subjective, inherently discretionary role during jury selection deprives a reviewing court of any practical ability to detect or to correct error. The absence of any review procedure pursuant to statute or even local rule, as well as the practical necessity for the court to defer to the magistrate's credibility determinations, means that "review" cannot be "*de novo*," but, in reality, must be by an impermissibly deferential, "clearly erroneous or contrary to law" standard.

In this case, the district court's offer of "review" was too little and too late. *See supra* at 3. Petitioners were given no advance notice of the specific areas of error the court would review, or the manner of such review; the court then limited its review to unsuccessful defense challenges for cause, of which there were none. The court communicated no willingness to review the *voir dire* transcript, nor did the court obtain it. The judge did not make himself available during or immediately after the *voir dire* to consider objections while the subtleties of the process were still fresh in the participants' minds; rather, he made himself available eight days later, immediately before opening statements, when no replacement jurors were available. Despite the fundamental importance of *voir dire* to petitioners' ability to obtain a fair trial, the district court trivialized the process.

Additionally, regardless of the necessity for or effectiveness of review in this case, due process requires that the trial judge be present during jury selection because of the intimate relationship between that event and the subsequent phases of the trial. As discussed more fully *supra* at 38-39, the trial judge's absence detracts from his ability to gain the jury's respect and trust, to prepare an effective charge, to rule on juror misconduct or mistrial motions, and to make discretionary evidentiary rulings dependent upon his evaluation of the likely prejudicial effect of evidence upon the jury. It also demeans the process, reducing its significance in the jurors' eyes.

As for the governmental and public interests involved, whatever limited economic interest the government has in preserving this infrequently-used procedure, *see supra* at 40-42, the government's countervailing interest in the actuality and public appearance of the "fair and accurate adjudication of criminal cases" is far greater. *Ake* v. *Oklahoma*, 470 U.S. at 79. The public's interest in the conduct of criminal proceedings surely exceeds its interest in any other function of the judicial system. The assignment of felony jury selection to a lesser officer can only diminish the public's confidence in the system's commitment to provide impartial criminal justice. *United States* v. *Trice*, 864 F.2d at ____, slip op. at 13, citing *Batson* v. *Kentucky*, 476 U.S. at 87.

Petitioners seek no new procedural right for criminal defendants. They merely seek to safeguard, against the challenge posed by the district court in this case, their historical right to have an Art. III judge personally preside over jury selection. Since their private interest far outweighs the government's minimal countervailing concerns, the assignment of jury selection violated their right to due process and they are entitled to a new trial.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

PETITIONERS' APPENDIX

CONSTITUTIONAL PROVISIONS

Article III of the United States Constitution provides, in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . .
>
> * * *
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

STATUTORY PROVISIONS

Title 18, United States Code, § 3401 provides, in pertinent part:

> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

Title 28, United States Code, Section 636 provides, in pertinent part:

§ 636. **Jurisdiction, powers, and temporary assignment**

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings of recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedures for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

Federal Rule of Criminal Procedure 1 states:

Rule 1. **Scope**

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

Federal Rule of Criminal Procedure 24(a) states:

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Federal Rule of Criminal Procedure 54 provides, in pertinent part:

Rule 54. **Application and Exception**

(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States . . .

* * *

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

* * *

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

Rule 1 of the Rules for Proceedings Before Magistrates in the Southern and Eastern Districts of New York states:

Rule 1. **Jurisdiction—28 U.S.C. Section 636**

Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.

Nos. 88-5014 and 88-5158

Supreme Court, U.S.
FILED
MAR 31 1989
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, permits a district court to delegate jury selection to a federal magistrate.

2. Whether a district court's delegation of jury selection to a federal magistrate violates Article III of the Constitution where the district court provides de novo review of the magistrate's selection of jurors.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-5014

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-5158

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 21-48) is reported at 848 F.2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1988. A petition for rehearing was denied on August 4, 1988 (J.A. 49-50). The petition for a writ of

certiorari in No. 88-5014 was filed on July 5, 1988, and the petition for a writ of certiorari in No. 88-5158 was filed on July 22, 1988. A supplemental petition for a writ of certiorari in both cases was filed on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners Jose Gomez and Diego Chavez-Tesina were convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to do the same, in violation of 21 U.S.C. 846. Petitioner Chavez-Tesina was also convicted of conducting a narcotics racketeering enterprise, in violation of 18 U.S.C. 1962(c), and interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952. Petitioner Gomez was sentenced to a total of ten years' imprisonment and a ten-year special parole term. Petitioner Chavez-Tesina was sentenced to a total of 20 years' imprisonment and a lifetime term of special parole. The court of appeals affirmed (J.A. 21-48).

1. Prior to petitioners' trial, the district court assigned the task of jury selection to a magistrate. The assignment was made pursuant to a local rule authorizing magistrates to perform the duties set forth in the Federal Magistrates Act, 28 U.S.C. 631 *et seq.* Petitioners' counsel initially

consented to the assignment,[1] but they subsequently objected before the magistrate at the beginning of jury selection (J.A. 13-15). The magistrate consulted with the district judge, noted the objection, and proceeded to select the jury (J.A. 16-17). The magistrate allowed the government a total of seven peremptory challenges and allowed petitioners and their three co-defendants a total of 14 peremptory challenges (J.A. 6). In order to ensure a jury of 12 and four alternates, the magistrate empaneled 37 prospective jurors (*ibid.*).

During jury selection, the magistrate explained the nature of the charges against petitioners and their co-defendants. The magistrate then questioned the venire at length concerning each prospective juror's ability to be fair and impartial in considering the evidence.[2] When asked by the magistrate whether additional questions were needed, defense counsel did not suggest any further questioning (2/9/87 Tr. 124-125). The magistrate excused 20 prospective jurors based on their responses to his questions (2/9/87 Tr. 21-22, 43, 55, 58, 59, 71, 73, 74, 75, 83, 91-93, 94, 127, 131). The magistrate also excused the only prospective juror the defendants challenged for cause (*id.* at 125-126).[3] After the parties exercised their peremptory

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[1] At a pretrial conference held on November 20, 1986, the district judge assigned jury selection to the magistrate (J.A. 1). As petitioners note (Br. 2 n.2), the court reporter's notes for that conference cannot be located and, consequently, have not been transcribed. As subsequently described by the district judge, however, petitioners' counsel had previously "agreed • • • that the magistrate would do it" (J.A. 18).

[2] The *voir dire* of February 9, 1987, has only recently been transcribed. Petitioners have lodged a copy of that transcript with the Court.

[3] The magistrate declined to excuse for hardship a prospective juror who had an ill relative. No counsel objected to the magistrate's action

challenges, 20 prospective jurors remained, four of whom were excused by the magistrate (*id.* at 132).

Following the magistrate's selection of the jury, the district judge considered the defendants' objections to the magistrate's authority. The judge inquired whether "there is any one juror for whom a challenge for cause was not sustained by [the magistrate]" and whether any party would "like to renew the objection" (J.A. 18). The judge also offered de novo review of any of the magistrate's selection decisions (J.A. 19). Counsel for petitioners did not respond to the invitation and counsel for a co-defendant explained that he sought to raise only "a jurisdictional issue, not an issue to a specific juror" (*ibid.*).

2. The court of appeals affirmed (J.A. 21-48). The court concluded that, consistent with both the Federal Magistrates Act and Article III of the Constitution, a district judge may delegate jury selection to a magistrate. The court rejected petitioners' statutory claim that Congress authorized the delegation of only "pretrial matters" to magistrates and that "pretrial matters" do not include *voir dire* (J.A. 29). According to the court, "even assuming arguendo that jury selection falls on the 'trial' side of the line between 'trial' and 'pretrial,' " the legislative history "plainly states that the [Magistrates Act] grants to district courts the freedom to experiment beyond duties traditionally categorized as 'pretrial' " (*ibid.* (emphasis omitted)). The court also rejected petitioners' assertion that by requiring the parties' consent to the delegation of civil and misdemeanor criminal trials to magistrates, Congress intended to allow the delegation of jury selection only with the parties' consent (J.A. 30). Jury selection, the

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in that regard or otherwise challenged the prospective juror for cause. See 2/9/87 Tr. 87, 93-94.

court explained (*ibid.*), is a function "separate and distinct" from "holding of an entire trial."

The court also rejected petitioners' claim that, even if it is authorized by statute, the delegation of jury selection to magistrates violates Article III (J.A. 30-37). According to the court, jury selection can be delegated to a non-Article III judge without violating Article III, because "the delegation of authority occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch *encroaching upon* the power of another" (J.A. 33 (emphasis in original)). The court also concluded that where, as in this case, an Article III judge retains the authority to review de novo the magistrate's selection decisions, delegation would not offend Article III even if jury selection were deemed "inherently judicial." The availability of de novo review, the court explained, "vested the ultimate decision regarding the composition of the jury with the trial court" (J.A. 33-34). Finally, the court rejected petitioners' claim that Article III requires an Article III judge to be present during jury selection (J.A. 35-37). The court declined to adopt petitioners' "debatable hypothesis" that "the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors" (J.A. 36).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Federal Magistrates Act in order to provide federal district courts with assistance in handling the avalanche of civil and criminal matters that threatened to overwhelm them. See *Mathews* v. *Weber*, 423 U.S. 261, 268-269 (1976). The purpose of the Magistrates Act was to encourage the use of magistrates for judicial tasks far beyond those previously undertaken by United States

commissioners in order to permit district court judges to focus their attention on their most pressing judicial responsibilities. To that end, Congress upgraded the position and specifically called on federal courts to experiment with the use of magistrates so that the courts could dispense justice more efficiently and expeditiously. With Congress's awareness, the use of magistrates in jury selection in both criminal and civil cases has long been an important aspect of this program. That practice is entirely consistent with Congress's intent in enacting the Magistrates Act and does not offend Article III when, as in this case, it is closely supervised by the district judge.

Contrary to petitioner's submission, jury selection falls within the wide range of duties Congress intended to allow a district judge to delegate to a magistrate. The language of the Magistrates Act is broad and admits of none of the substantial restrictions on magistrate authority that petitioners propose. The legislative history, moreover, shows that Congress intended magistrates to take on a wide variety of duties, and was repeatedly made aware that magistrates would be used in jury selection. Finally, petitioners' proposed construction of the Magistrates Act is refuted by the views expressed by the relevant Judicial Conference committee and the Administrative Office of the United States Courts, which worked closely with Congress during the enactment of the Magistrates Act and which agree that magistrate jury selection is permissible under the Act.

There is likewise no merit to petitioners' claim that Article III forbids magistrates from conducting *voir dire*. This Court rejected a very similar claim in *United States* v. *Raddatz*, 447 U.S. 667 (1980). The Court in *Raddatz* held that allowing a magistrate to conduct a suppression hearing does not violate Article III when the magistrate's proposed findings and recommendations are subject to de novo review by the district judge.

This case is not distinguishable from *Raddatz* in any material respect. Here, as in *Raddatz*, the district judge exercised de novo review, leaving "the entire process * * * under the district court's total control and jurisdiction" (447 U.S. at 683). Contrary to petitioners' claim, moreover, the relationship of *voir dire* to the jury's verdict is no more immediate than is a suppression motion. Nor is meaningful de novo review of *voir dire* impossible. In most circumstances, the judge will likely find it adequate to examine the *voir dire* transcript and hear argument by counsel. And, if circumstances warrant, the judge is of course free to redo the magistrate's work in whole or in part. In this case, however, because petitioners did not object to the quality of the *voir dire* or to the magistrate's decision to seat or excuse any prospective juror, they cannot complain that the review they received was somehow inadequate.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT AUTHORIZES DISTRICT COURTS TO DELEGATE JURY SELECTION TO MAGISTRATES

A. Section 636 of the Magistrates Act outlines the jurisdiction and powers of magistrates. Two different subsections of Section 636 support the district judge's decision to delegate jury selection to the magistrate in this case.

1. First, Section 636(b)(1) provides that "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court."[4] While the term

[4] The exception in Section 636(b)(1)(A) for certain matters has no bearing on this case. Jury selection is not among those matters excepted and, in any event, the exception is solely for the purpose of mandating a de novo determination by the district judge in those in-

"pretrial," standing alone, is subject to differing interpretations, it may reasonably be read in this context to include jury selection. Jury selection is logically distinct from, and antecedent in time to, the trial itself, which commences with the swearing in of the jury, opening statements, and the introduction of evidence.

The question when a trial begins is perhaps most important in the double jeopardy context. The issue is important in that setting because the constitutional prohibition does not apply until a defendant is "put to trial before the trier of the facts." *Serfass* v. *United States*, 420 U.S. 377, 388 (1975); see *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501, 509 n.8 (1984). And in that setting, the Court has held that the trial begins after the "jury is empaneled and sworn" (420 U.S. at 388).

The characterization of jury selection as a "pretrial" procedure is not limited to the double jeopardy setting. Rather, this Court and the leading commentators have commonly referred to *voir dire* as occurring prior to trial. See, *e.g.*, *Frazier* v. *United States*, 335 U.S. 497, 513 (1949) (emphasis added) ("After accepting [the jurors] *before trial*, [the defendant] could not challenge them successfully in a motion for a new trial."); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 381, at 342 (1982) ("the voir dire is held immediately before the trial commences"); 2 M. Rhodes, *Orfield's Criminal Procedure Under the Federal Rules* § 25.15 (2d ed. 1986) ("until a jury is sworn, there is not a trial"); W.R. LaFave & J.H. Israel, *Criminal Procedure* § 21.3, at 723 (1984) ("In most

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stances in which a magistrate hears and recommends a particular disposition to which a party objects (see 28 U.S.C. 636(b)(1)(B) & (C)). Hence, the statute allows magistrate consideration of even those pretrial matters nominally "except[ed]" from the grant of magistrate authority.

localities, it is the practice to conduct the voir dire and select the jury immediately preceding the trial of the case in which that jury is to serve."). It is therefore reasonable to view *voir dire* as a "pretrial matter" within the meaning of Section 636(b)(1).

This Courts' precedents do not establish that jury selection is part of the "trial." There is therefore no basis for petitioners' contention (Br. 15-16) that Congress could not have intended in the Magistrates Act to include *voir dire* as a "pretrial matter." While the Court has referred in certain cases to the fact that a "trial judge" conducted *voir dire*, Pet. Br. 15, citing *Ristaino* v. *Ross*, 424 U.S. 589, 595 (1976), and *Ham* v. *South Carolina*, 409 U.S. 524, 528 (1973), that is not any indication that the Court views jury selection as part of the trial. As demonstrated by numerous other instances in which the Court has similarly referred to participation by a "trial judge" in pretrial activities, the Court uses that expression interchangeably with "district court" and without any intention to label a particular activity as part of the "trial."[5]

The other decisions of this Court on which petitioners rely (Br. 15-16) likewise do not address this issue. The Court commented in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), that the peremptory challenge is a "necessary part

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[5] See, *e.g.*, *Beech Aircraft Corp.* v. *Rainey*, 109 S. Ct. 439, 444 (1988) (emphasis added) ("The *trial* judge determined, at a *pretrial* conference * * *."); *Rock* v. *Arkansas*, 107 S. Ct. 2704, 2707 (1987) (emphasis added) ("The *trial* judge held a *pretrial* hearing on the motion * * *."); *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 427 (1985) (emphasis added) ("the *trial* judge issued a *pretrial* ruling * * *."); *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987 (1984) (emphasis added) ("At a *pretrial* suppression hearing, the *trial* judge concluded * * *."); *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U.S. 241, 241 (1978) (per curiam) (emphasis added) ("the *trial* judges closed all *pretrial* hearings").

of trial by jury," but in context it is clear that that comment was meant simply to emphasize that the peremptory challenge is " 'one of the most important of the rights secured to the accused.' " *Ibid.*, quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1895). The Court in *Swain* did not purport to address the quite different question whether the trial itself should be deemed to begin before or after the selection of the jury.

Petitioners note (Br. 16) that Fed. R. Crim. P. 23 and 24, which address jury issues, appear in that portion of the Rules entitled "Trial." The placement of those Rules, however, does not suggest that Congress (or this Court) believes that jury selection is part of the trial itself, rather than a "pretrial" proceeding. The Federal Rules of Criminal Procedure do not, by their internal subheadings, purport to distinguish between pretrial and trial matters.[6] Rule 23, moreover, is simply a "formulation of the constitutional guaranty of trial by jury" and does not address jury selection at all (see notes of Advisory Committee accompanying Rule 23). And while Rule 24 does describe how "trial jurors" are to be selected from the venire, its distinction between "trial jurors" and "prospective jurors," from whom the former are chosen, logically suggests that the selection process is not itself part of the trial. The notes of the Advisory Committee accompanying the 1966 amendment of Rule 24 likewise show that the Committee viewed the jury selection process as distinct, and preliminary to, the trial itself. See 1966 Advisory Committee notes (emphasis added) ("an alternate juror may be

[6] The various subheadings include "scope, purpose, and construction," "preliminary proceedings," "indictment and information," "arraignment and preparation for trial," "venue," "trial," "judgment," "appeal," "supplemental and special proceedings," and "general provisions."

called in the situation where it is first discovered *during the trial* that a juror was unable or disqualified to perform his duties *at the time he was sworn*").

2. While we believe that jury selection can be assigned to a magistrate as a "pretrial" matter under Section 636(b)(1), there is an alternative basis in the statute to authorize magistates to perform that function. Section 636(b)(3) authorizes a district judge to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States." The purpose of that subsection is to permit district judges "to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters' " (S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976)).

In drafting Section 636(b)(3), Congress wrote broadly. The only limitations on the authority of courts to assign matters to magistrates are those posed by "the Constitution and laws of the United States." In order to prevail before this Court, petitioners must therefore point to some "law" or constitutional provision that bars the delegation of jury selection to magistrates.[7]

To that end, petitioners argue (Br. 25-27) that Fed. R. Crim. P. 24 and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, prohibit a magistrate from

[7] If the Court concludes that jury selection is a "pretrial matter," within the meaning of Section 636(b)(1)(A), petitioners are left only with their constitutional claim. While delegations under Section 636(b)(3) cannot be made if they are "inconsistent with the * * * laws of the United States," delegations pursuant to Section 636(b)(1) are permitted "[n]otwithstanding any provision of law to the contrary." As petitioners implicitly concede (Br. 27), the presence of that language in paragraph (1) removes any possible argument based on any "laws of the United States" other than the Constitution.

conducting *voir dire* and thus limit the scope of Section 636(b)(3). Petitioners' reliance on these "laws" is misplaced, however, because neither precludes a magistrate from conducting *voir dire* at a judge's request.

Section 1867(a) of the Jury Selection and Service Act, on which petitioners rely (Br. 26-27), simply describes the procedures that must be followed in bringing a challenge to the selection of a grand or petit jury on the ground of noncompliance with a provision of the Act. The statutory provision nowhere intimates that only a district judge may conduct *voir dire*; nor does it even suggest that a magistrate could not consider a statutory challenge to jury selection procedures at a judge's request.

Rule 24 likewise does not purport to address the lawfulness of magistrate-conducted *voir dire*. It states that a court "may" permit the defendant or his counsel to conduct *voir dire* and that a court "may" conduct the examination "itself." Rule 24 does not bar a district judge from asking the magistrate to conduct *voir dire*, nor does it otherwise indicate that the judge must be present during *voir dire*. Significantly, Rule 24 uses the term "court," not the term "judge," to refer to the officer presiding over the jury selection process. The term "judge" is the term that is "used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act." Notes of the Advisory Committee accompanying 1972 amendment to Rule 54. The use of the term "court" is therefore consistent with the performance of duties by either a judge or a magistrate.

Even if Rule 24 could be read to provide that only a judge may conduct *voir dire*, Rule 24 is not a "law[] of the United States," within the meaning of Section 636(b)(3). While a court rule has been found in another context to constitute a "law of the United States," see *United States*

v. *Hvass*, 355 U.S. 570, 575 (1958),[8] court rules ordinarily do not have that status, and the language of the Magistrates Act itself supports the view that that general principle applies in this context. Section 636(a)(1) provides that each magistrate shall have "all powers and duties conferred or imposed upon United States commissioners *by law or by the Rules of Criminal Procedure for the United States District Courts*" (emphasis added). The statutory juxtaposition strongly suggests that, for purposes of Section 636, Congress did not intend to equate "law" with the Federal Rules of Criminal Procedure, including Rule 24.

B. The legislative history of the enactment of the Magistrates Act in 1968 and its amendment in 1976 does not provide a clear answer to whether *voir dire* is a "pretrial matter," within the meaning of Section 636(b)(1), rather than an "additional dut[y]," within the meaning of Section 636(b)(3). But the history leaves no doubt that, however denominated, the conduct of *voir dire* falls within one of those two categories and can therefore properly be delegated to a magistrate under the Act. Indeed, the legislative history shows that the very reason Congress amended the Act in 1976 was to overcome the type of crabbed construction now advanced by petitioners. It also shows

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[8] In *Hvass*, the Court concluded that an attorney who made a willfully false statement while under oath pursuant to a local federal court rule was subject to criminal prosecution for perjury. The Court reasoned that "[t]he phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base" (355 U.S. at 575).

that Congress was repeatedly made aware that jury selection was among those tasks being performed by magistrates, and that Congress sought to expand, rather than restrict, the functions magistrates could perform.

1. Relying on *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892) (see Br. 13), petitioners argue that the structure and legislative history of the Magistrates Act trump what might otherwise appear to be the plain meaning of the statute. According to petitioners (Br. 12-22), the structure and history of the Act show that Congress considered jury selection an "integral part" of a "felony trial," which Congress specifically excluded from magistrate jurisdiction, and that, notwithstanding the sweeping terms of the Act, Congress intended to restrict a magistrate's "additional duties" to "routine nonjudicial burdens" and "nonadjudicative tasks." The Act's structure and legislative history, however, support neither assertion.

To be sure, Congress did not intend to authorize magistrates to conduct felony trials. The Act makes that clear by explicitly giving magistrates the authority to try, with the parties' consent, both misdemeanor offenses and civil matters, but not felony offenses (see 18 U.S.C. 3401(a), 28 U.S.C. 636(c)).[9] But there is no suggestion in the statute or legislative history that Congress considered jury selection to be part of the felony trial for these purposes and thus intended to bar magistrates from conducting *voir dire*.

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[9] The legislative history makes that point clear as well. See, *e.g.*, H.R. Rep. No. 1629, 90th Cong., 2d Sess. 20-22 (1968); S. Rep. No. 371, 90th Cong., 2d Sess. 29-33 (1968); H.R. Rep. No. 287, 96th Cong., 1st Sess. 2, 17 (1979); S. Rep. No. 74, 96th Cong., 1st Sess. 5-7, 17 (1979).

Petitioners' assumption that Congress considered *voir dire* to be part of trial is a flaw that runs throughout their brief and infects their entire presentation. For example, petitioners assume (Br. 24) that magistrates were unable to conduct *voir dire* in misdemeanor cases in 1976 because the statute then "required misdemeanor defendants to waive their right to a jury trial in order to be tried by a magistrate." The fact that magistrates could not preside over misdemeanor jury trials in 1976, however, does not compel the conclusion that they could not then conduct *voir dire* for misdemeanor trials. Hence, petitioners are wrong in concluding (Br. 24) that "if the court of appeals is correct, Congress in 1976 authorized magistrates to select felony juries over the defendant's objection, but prohibited magistrates from selecting misdemeanor juries with the defendant's consent." There is no such anomaly because the magistrates could select misdemeanor juries with or without the defendant's consent in 1976; they simply were unable to preside over the jury trial itself.

At bottom, petitioners' statutory argument rests on their assertion (Br. 16-18) that Congress's failure to refer specifically to jury selection in Section 636(b)(1) conclusively shows that Congress did not intend to confer such authority on magistrates. Thus, petitioners argue (Br. 16) that Congress failed "to provide any framework for district court review of magistrate-conducted felony jury selection." Petitioners' reasoning is flawed, however, because, as both the language and legislative history make clear, Congress did not purport to list in Section 636(b)(1) all those specific "pretrial matters" that could properly be delegated to a magistrate. Congress instead referred broadly to "any" pretrial matter, and it clearly intended flexibility rather than rigidity to be the touchstone for the statute's implementation. See, *e.g.*, *Jurisdiction of United*

States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 35 (1975) [hereinafter *1975 Senate Hearings*] (report of Judicial Conference) (pretrial provisions "broadly worded to authorize the maximum use of magistrates prior to trial").

Hence, the absence of any "framework for the district court review" of magistrate-conducted jury selection is not significant. Section 636(b)(1) generally establishes two different schemes for district courts to review magistrates' rulings on pretrial matters. The standard of review and the procedure followed depend on the nature of the pretrial matter at issue. In the case of eight specifically listed dispositive pretrial matters, a district judge must exercise "de novo determination." In all other cases, a district judge "may reconsider any pretrial matter * * * where it has been shown that the magistrate's order is clearly erroneous or contrary to law" (28 U.S.C. 636(b)(1)(A) & (C)).

In this case, of course, the district court exercised de novo review of the magistrate's jury selection decisions. Contrary to petitioners' assertions (Br. 17 & n.10), however, the court's use of de novo review did not violate the Act. The Act provides only for a minimum standard of review; it does not prohibit a district court from exercising more extensive supervision of the magistrate's work.[10] Indeed, in light of the constitutional claims raised in this case, the district judge's decision to exercise de novo review was prudent.

[10] Section 636(b)(4) also specifically authorizes district courts to "establish rules pursuant to which the magistrates shall discharge their duties," which can include adjustments in the standard of review for particular functions.

2. Nor is there any merit to petitioners' contention (Br. 19-22) that the legislative history shows that Congress intended to restrict those "additional duties" that are delegable under Section 636(b)(3) to "routine nonjudicial burdens" and "nonadjudicative tasks." Congress included the "additional duties" language in the original version of the statute, the Federal Magistrates Act of 1968, Pub. L. No. 90-578, § 101, 82 Stat. 1107, 1113 (1968).[11] Sponsors of the legislation and witnesses who appeared before House and Senate Committees repeatedly declared that the "additional duties" provision should provide a broad grant of authority to district courts to delegate tasks.[12]

[11] As originally enacted, the Magistrates Act enumerated three duties that district courts could assign to magistrates: serving as a special master; assisting a district court in pretrial matters in civil and criminal actions; and preliminarily reviewing applications for post-trial relief in criminal cases. The Act expressly stated, however, that magistrates were not restricted to those functions. See Pub. L. No. 90-578, § 101, 82 Stat. 1107, 1113 (1968).

[12] For instance, Senator Tydings, the author of the Act and its principal Senate sponsor, told the House subcommittee that was considering the legislation that "[w]e wanted to make it clear that magistrates are available to the courts to serve in *any* capacity not in conflict with the Constitution or the laws of the United States, as an officer of the district court." *Federal Magistrates Act: Hearings on S. 945, etc., Before Subcomm. No. 4 of the House Comm. on the Judiciary,* 90th Cong., 2d Sess. 87 (1968) [hereinafter *1968 House Hearings*] (emphasis added). See *Federal Magistrates Act: Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 14 (1966-1967) [hereinafter *1966-1967 Senate Hearings*] (remarks of Sen. Tydings) ("[I]t is appropriate to allow the district court to make whatever use of [the magistrates'] services as it sees fit, in addition to the functions that the statute assigns them."); *id.* at 196 (testimony of Hon. Talbot Smith) ("[I]t would be helpful to the district judges to have a wide leeway in their authorization of the use of magistrates."); *id.* at 52 (testimony of Hon. Edward S. Northrup) (The Act is "flexible enough to be capable of being adjusted to almost any situation that might exist.").

Congress's purpose was to allow district judges to experiment and use magistrates in imaginative and innovative ways not yet foreseen by Congress. See S. Rep. No. 371, 90th Cong., 2d Sess. 26-27 (1968) ("If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, * * * there will be increased time available to the judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.").

Congress evinced no intention to limit the experimentation with the use of magistrates to "routine, nonjudicial burdens." That had been the restricted scope of tasks assigned to the United States commissioners under the pre-1968 system that Congress sought to abolish (see S. Rep. No. 371, *supra*, at 10-11). While those same responsibilities remained assignable to magistrates pursuant to Section 636(a)(1), a primary purpose of the 1968 law was to create new "judicial responsibilities" for magistrates and thereby attract "high-caliber talent" to the position. See 114 Cong. Rec. 27,341 (1968) (remarks of Rep. Poff); *id.* at 29,407 (remarks of Sen. Tydings) ("By raising the standards of the lower judicial office by making the position more attractive to highly qualified individuals, and by increasing the scope of the responsibilities that can be discharged by that office, the bill establishes a system capable of increasing the overall efficiency of the Federal judiciary by relieving the district courts of some of their minor burdens * * *."); see also H.R. Rep. No. 1629, *supra*, at 10 ("the jurisdiction exercised by the magistrate is the jurisdiction of the court itself"); S. Rep. No. 371, *supra*, at 27 ("magistrate * * * is in fact exercising the jurisdiction and powers of the district court as an officer of that court"); *1966-1967 Senate Hearings* 27 (remarks of Sen. Tydings); *1968 House Hearings* 81 (testimony of Sen. Tydings); *id.* at 128 (testimony of Asst. Dep. Attorney General William T. Finley).[13]

The legislative history of the 1976 amendment of the Magistrates Act is to the same effect. The purpose of that legislation was to amend Section 636(b) "in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court" (H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2 (1976)).[14] Both the House and Senate Reports stressed, in particular, that the purpose of subsection (b)(3) was to "enable[] the district courts to continue innovative experimentations in the use of this judicial officer" (H.R. Rep. No. 1609, *supra*, at 12; S. Rep. No. 625, 94th Cong. 2d Sess. 10 (1976)). For that reason, Congress placed the "additional duties" provision "in an entirely separate subsection [to] emphasize[] that it is not restricted in any way by any other specific grant of authority to magistrates" (H.R. Rep. No. 1609, *supra*, at 12; S. Rep. No. 625, *supra*, at 10). Congress also criticized some district courts for not having made extensive use of magistrates since the passage of the Magistrates Act in

[13] Petitioners' reliance on Rep. Poff's statement in 1968 that the "additional duties" provision "was not in any way intended as the predicate for expanding the jurisdiction of the magistrate," is misplaced (Pet. Br. 19, quoting 114 Cong. Rec. 28,360-28,361 (1968)). Rep. Poff was referring only to the power of a magistrate "to *decide a case* outside of the minor offense jurisdiction created by this bill" (*id.* at 28,360 (emphasis added)). But in any event, it is clear that the 1976 amendments were intended to avoid just the type of narrow construction petitioners propound.

[14] Congress amended the Act in 1976 partly in response to this Court's decision in *Wingo* v. *Wedding*, 418 U.S. 461 (1974) in which the Court held that the "additional duties" provision in effect at that time did not authorize a district judge to assign magistrates responsibility for holding evidentiary hearings on habeas corpus petitions. Congress intended to overrule that ruling through the 1976 amendments. See H.R. Rep. No. 1609, *supra*, at 5; S. Rep. No. 625, *supra*, at 3-4; *United States* v. *Raddatz*, 447 U.S. at 674.

1968 (see H.R. Rep. No. 1609, *supra,* at 4; S. Rep. No. 625, *supra,* at 3; *1975 Senate Hearings* 33 (report of Judicial Conference)).

The legislative reports, hearings, and debates preceding the 1976 amendments, like those held prior to the passage of the Magistrates Act in 1968, refute petitioners' contention (Br. 19) that Congress intended to assign magistrates only "routine, nonjudicial burdens" and "nonadjudicative tasks." They show that Congress expected magistrates, under the supervision of district judges, to undertake "adjudicatory function[s]" and "very important judicial duties." See *United States* v. *Raddatz,* 447 U.S. at 681 n.8 (citing S. Rep. No. 625, *supra,* at 6, and H.R. Rep. No. 1609, *supra,* at 8) ("permitting the exercise of an adjudicatory function by a magistrate"); *1975 Senate Hearings* 1 (remarks of Sen. Burdick) ("[T]he declared objective of the Congress when it passed the Magistrates Act of 1967, was to create in the magistrate a judicial officer who could perform various judicial duties * * *."); *id.* at 5 (testimony of Hon. Charles M. Metzner) ("Under authority of section 636(b), magistrates are presently performing very important judicial duties for the district courts.").

Petitioners make much (Br. 22-25) of their claim that Congress failed in 1976 "to override the existing practice that district judges always presided at jury selection." Absent affirmative evidence of an intent to alter the status quo, petitioners argue, the statute must be construed not to permit magistrates to conduct jury selection.

That argument rests on a false premise. When Congress amended the Magistrates Act in 1976, magistrate-conducted *voir dire* was already an accepted feature of practice under the Act; indeed, it was the very type of experimental and innovative use of magistrates that the framers of the Act sought to encourage.

The first year of full nationwide implementation of the magistrates system, 1972, "was one of transition in which judges experimented with the use of magistrates." See *Administrative Office of the United States Courts, Ann. Rep.* 250 (1972). That year the Judicial Conference's Committee on the Administration of the Federal Magistrate System authorized a subcommittee to study the conduct of *voir dire* by magistrates. The subcommittee, which issued its report in July 1973, found that 9 district courts out of the 87 that responded had, in varying degrees, already authorized magistrates to conduct *voir dire.*[15] See Judicial Conference, Report of the Subcommittee Assigned to Study the Conduct of Voir Dire by Federal Magistrates 2-4 (1973) [hereinafter *Voir Dire* Report].[16] Today, 51 dis-

[15] At least two of the four districts that did not respond, the Eastern and Middle Districts of Louisiana, did have local rules at the time permitting a magistrate to "conduct voir dire examination and impanel trial juries" (See *Magistrate System: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess. 81 (1972) (copy of local court rules for Eastern District of Louisiana appended to prepared testimony of Harry Lee, Chairman of Legislative Comm. of Federal Magistrates); Local Rules for the Middle District of Louisiana, Rule 26(c)(5)(i) (effective April 16, 1972).

[16] A copy of the report has been lodged with the Court. The report's survey found (pages 3-4) that the districts allowed magistrate-conducted *voir dire* in differing circumstances; Central California, Oregon, and Western Michigan (only in emergency circumstances) allowed magistrate-conducted *voir dire* in both civil and criminal cases; the District of Columbia and Northern Iowa similarly authorized magistrates to conduct *voir dire* in civil and criminal cases, but only with the written consent of the parties; Western Kentucky and Eastern Texas permitted magistrate-conducted *voir dire* only in civil cases; Arizona allowed the practice only in civil cases with the parties' consent, but then contemplated that a similar rule would be adopted for criminal cases; and in Western Pennsylvania a clerk conducted *voir dire* in civil cases and one judge permitted the magistrate to conduct *voir dire* in criminal cases so long as the judge ruled on all legal issues. While the subcommittee questioned the practical value of magistrate-conducted *voir dire,* it explicitly did "not recommend that those districts which have adopted rules or followed the practice of having magistrates conduct voir dire examination of jurors repeal the

tricts have local court rules that expressly provide magistrates with unqualified authority to conduct *voir dire* in civil and criminal cases;[17] 5 districts provide such au-

rules or abandon the practice" (*Voir Dire Report* 9). The subcommittee did suggest, however, that those districts just beginning to experiment with magistrate-conducted *voir dire* limit the practice to civil cases with the consent of the parties (*ibid.*). The subcommittee further recommended that there be "some provision for the district judge to review the rulings of the magistrate which are objected to * * * [e]specially * * * if the rule or practice is to be employed in criminal cases" (*ibid.*). The Judicial Conference's Committee on the Operation of the Jury System accepted the Report in September 1973; the minutes of the review of the subcommittee's report by the Judicial Conference's Committee on the Administration of the Federal Magistrates Act "expressed no objection" to magistrate-conducted *voir dire* in civil cases with the parties' consent and made no comment on the practice in other circumstances, including criminal cases. None of these documents (copies of which have been lodged with the Court) questions the legality of magistrate-conducted *voir dire* under the Act. Significantly, however, immediately following passage of the 1976 legislation, the Judicial Conference's Magistrates Committee distributed a memorandum that provided, without limitation, that magistrates could conduct *voir dire* (see pages 25-26 & note 22, *infra*).

[17] See N.D. Ala. Mag. R. 4(f); S.D. Ala. R. 26(1)(i)(6); C.D. Cal. Mag. R. 1.76; E.D. Cal. R. 303(2); N.D. Cal. R. 405(g); S.D. Cal. R. 501-8(f); D. Col. R. 303(2); D. Del. Mag. R. 1(i)(6); D. D.C. R. 501(b)(6); M.D. Fla. R. 6.01(c)(20); N.D. Fla. R. 24(J)(2)(c)(1); S.D. Fla. Mag. R. 1(i)(6); S.D. Ga. R. 21.5; D. Haw. R. 401-8(f); D. Idaho R. 4-101(j)(6); C.D. Ill. R. 3(a)(14); S.D. Ill. R. 29(i)(6); N.D. Ind. R. M-1(i)(9); S.D. Ind. R. M-13; N.D. Iowa R. 31(j)(4); S.D. Iowa R. 31(j)(4); D. Kan. R. 601(i)(6); E.D. La. R. 20.7(f); M.D. La. R. 26(1)(i)(5); W.D. La. R. 28(a)(9)(e); E.D. Mich. R. C-i(j)(6); W.D. Mich. Mag. R. 1(h)(5); D. Minn. R. 16(E)(5); W.D. Mo. R. 22(K)(6); D. Neb. R. 44(I)(6); D. Nev. R. 500-9(f); D.N.H. Mag. R. D(3); D. N.J. R. 40(A)(5); E.D.N.C. R. 62.09(f); M.D.N.C. R. 401(b)(4); D. N.D. R. 28(c)(4); N.D. Ohio R. 19.10(2); S.D. Ohio (W. Div'n) R. 1(1)(6); E.D. Pa. R. 7(i)(6); M.D. Pa. R. 901.9(a)(7); W.D. Pa. Mag. R. 6(e); D. P.R. R. 506.6; D. R.I. R. 32(e)(5); E.D. Tenn. R. 21.2(d); M.D. Tenn. R. 601(a)(2); W.D. Tenn. R. 17(i)(6); D. Vt. Mag. R. 1(A)(IX)(a)(iv); W.D. Wash. Mag. R. 9(d); N.D. W.Va. R. 4.01(i)(6); S.D. W.Va. Mag. R. 1(i)(6); E.D. Wis. R. 13.06(d).

thority with some limitations;[18] and 18 districts, including the district involved in this case (the Eastern District of New York), do not specifically list *voir dire* as a duty for magistrates, but instead generally provide in the local rules that magistrates may exercise all powers and perform all duties conferred on them by Section 636.[19]

When Congress amended the Magistrates Act in 1976, it was aware that magistrates were conducting jury selection. On at least seven different occasions between the passage of the Magistrates Act in 1968 and its amendment in 1976, including during the hearings that led directly to the 1976 legislation, Congress was notified that magistrates were conducting jury selection, including *voir dire*.[20] Congress

[18] D. Alaska R. 3(2) (consent of parties); D. Ariz. R. 18(d)(6) (same); N.D. Okla. R. 32(B)(12) (civil cases); W.D. Okla. R. 39(B)(12) (same); E.D. Wash. 8(d) (same).

[19] See M.D. Ala. R. 32(c); D. Conn. Mag. R. 1; N.D. Ill. R. 1.70(A); E.D. Ky. R. 18(a); W.D. Ky. R 18(a); D. Me. R. 8(c); E.D. Mo. R. 21; D. Mont. R. 400-1; D. N.M. R. 27(a); E.D.N.Y. Mag. R. 1; S.D.N.Y. Mag. R. 1; S.D. Ohio R. 2.4.1 (except Western Div'n); E.D. Okla. R. 32; D. Or. R. 135-1(b); D. S.C. R. 19.01; E.D. Tex. R. 15; S.D. Tex. R. 15(A); E.D. Va. R. 29(N).

[20] See *1975 Senate Hearings* 39 (testimony of Chief Judge Robert C. Belloni); *id.* at 20 (testimony of Morey L. Sear, Chairman of the Leg. Comm. Nat'l Council of U.S. Magistrates) 20 (indicating preference for amendment of the law or further legislative history to "make clear the authority of magistrates to select juries * * *"); Comptroller General, Report to Congress, *The U.S. Magistrates: How Their Services Have Assisted Administration of Several District Courts; More Improvements Needed, reprinted in Improvement of Judicial Machinery: Hearings Before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 391 (1975) (duties of magistrate in Oregon district court include "presiding over the selection of juries in

expressed no objection on any of these occasions. Instead, on one occasion Congress appears to have expressed its general support for the practice.

The expression of congressional support occurred following the testimony of Chief Judge Robert C. Belloni of the District of Oregon in 1975 before the Senate subcommittee responsible for the magistrates bill that passed in 1976. Judge Belloni told the subcommittee that magistrates had increased the efficiency of his district by, among other things, "presid[ing] over the *voir dire* and jury selection of a trial to begin momentarily before a judge who is putting the finishing touches on his current case" (*1975 Senate Hearings* 39). The House and Senate Reports both selected Judge Belloni's testimony for special praise in their discussion of the scope of a magistrate's intended authority under the Act; they referred to his testimony and stated that "[a] similar scope of additional

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both civil and criminal cases"); *The Omnibus Judgeship Bill: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 413 (1973) (testimony of Judge Joe J. Fisher) ("I use [the magistrate] to select juries, which I think is a very good use for a magistrate. You can get consent from the attorneys to use them in this way, and it is a saving of the court's time."); *id.* at 518 (testimony of Chief Judge Robert C. Belloni) (magistrate "presides at jury selections"); *Magistrate System: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess 81 (1972) (copy of local court rules for Eastern District of Louisiana appended to prepared testimony of Harry Lee, Chairman of Leg. Comm. of Federal Magistrates) ("The United States Magistrates * * * shall perform the following additional duties as and when assigned to them by any Judge in this District: * * * * * Conduct voir dire examination and impanel trial juries."); *Administrative Office of the United States Courts, Ann. Rep.* 250 (1972) ("Some of the other duties being performed by magistrates in various district courts include the following: * * * * * Presiding over the selection of juries in civil cases, including voir dire examination.").

duties is intended for magistrates under the provisions of [the bill]" (S. Rep. No. 625, *supra*, at 7; H.R. Rep. No. 1609, *supra*, at 9).[21]

C. Petitioners' narrow interpretation of the Magistrates Act is also suspect because it is contrary to the contemporaneous views expressed by the Judicial Conference's Committee on the Administration of the Federal Magistrate System and the Administrative Office of the United States Courts. Only two weeks after the passage of the 1976 amendments, the Judicial Conference's Magistrates Committee distributed to all federal judges and magistrates a "Jurisdictional Checklist" listing those "duties which appear to be appropriate for delegation to magistrates under the new law" (page 1).[22] With respect to "miscellaneous additional duties" under Section 636(b)(3),

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[21] Petitioners' attempt (Br. 24 n.15) to diminish the significance of Judge Belloni's testimony is unsuccessful. First, the judge's discussion is not "ambiguous" (*ibid.*). It includes no reference to "civil cases," as suggested by petitioners (*ibid.*). Nor does the qualification that magistrates can act only where "lawyers stipulate" apply to his discussion of *voir dire*. That qualification relates to a different subject – the circumstance of a magistrate "presid[ing] over the jury or nonjury trial exactly as if he were a judge" (*1975 Senate Hearings* 39). Finally, petitioners get no comfort from the fact that the favorable mention of Judge Belloni's testimony occurs under the heading "pretrial matters." As previously explained, although there is some ambiguity concerning whether Congress considered *voir dire* to be a "pretrial matter" rather than just as an "additional dut[y]," what remains clear is that Congress intended, one way or the other, to allow district judges to delegate that task to magistrates. In any event, although the relevant discussion occurs under the "pretrial" heading, both reports state that "[a] similar scope of *additional duties* is intended for magistrates under the provisions of [the bill]" (S. Rep. No. 625, *supra*, at 7 (emphasis added); H.R. Rep. No. 1609, *supra*, at 9).

[22] A copy of that memorandum, dated November 5, 1976, has been lodged with this Court.

the checklist includes "[c]onduct of *voir dire* and selection of juries for district judges" in its list of duties that "to the extent that [they] * * * are not covered by subsection 636(b)(1) * * * they may be delegated to a magistrate under subsection 636(b)(3)" (page 12). The Administrative Office's *Legal Manual for United States Magistrates* [hereinafter *Magistrates Manual*] takes the identical view (Vol. 1, § 3.09, at page 3-15).[23] The Manual does not restrict *voir dire* to civil cases or to cases where the parties have consented. The Manual also includes a set of model local court rules that, in the list of "other duties" of a magistrate, authorize a magistrate to "[c]onduct voir dire and select petit juries for the court" (*Magistrates Manual* 3-49 to 3-50).[24]

The views of the Judicial Conference's Committee on Magistrates and of the Administrative Office are entitled to significant weight. Pursuant to congressional design,

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[23] Petitioners argue that the views of the Manual should be discounted in this respect because it is "difficult to reconcile" the Manual's acknowledgment (at page 3-19) that magistrates cannot try felony cases "with the manual's approval of *voir dire* delegation, unless such approval was meant to apply only to civil cases" (Pet. Br. 18 n.11). Petitioners' mistake, which is repeated throughout their brief, is their unstated assumption that *voir dire* is part of the felony jury trial itself. As is made clear, however, by the very provisions upon which petitioners rely, the Manual does not consider *voir dire* to be part of the trial itself. Hence, the Manual is not internally inconsistent.

[24] To be sure, a foreword to the Manual points out that it "is designed merely to be a guide and a readily available reference work" and "is not an official directive from the Judicial Conference of the United States or the Administrative Office or a substitute for decisional law * * *" (*Magistrates Manual* iii). Nonetheless, the Manual is instructive, because it reflects the interpretation of the Act by Judicial Branch officers intimately familiar with its origins and administration.

the Judicial Conference and the Administrative Office "share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary." *Mistretta* v. *United States*, 109 S. Ct. 647, 663 (1989). They worked closely with Congress in its consideration of the magistrates legislation, both when the statute was originally enacted in 1968 and when it has since been amended. They also have significant official responsibilities under the Act and related federal laws.[25] Not surprisingly, therefore, both the Senate and House Reports and various individual legislators relied on the Judicial Conference's support in advocating the legislation. See, *e.g.*, H.R. Rep. No. 1609, *supra*, at 13; S. Rep. No. 625, *supra*, at 11; 122 Cong. Rec. 35,181 (1976) (remarks of Rep. Danielson); *1975 Senate Hearings* 30 (remarks of Mr. Westphal, Subcommittee Chief Counsel); S. Rep. No. 371, *supra*, at 9; 114 Cong. Rec. 27,227 (1968) (remarks of Rep. McClory); *id.* at

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[25] As petitioners acknowledge (Br. 23), the Judicial Conference initially proposed the legislation that, with some modification, passed Congress in 1968 and 1976. Representatives of the Conference also testified at the hearings on the legislation and filed reports with the relevant congressional committees on the bills under consideration. See, *e.g.*, *1975 Senate Hearings* 4 (testimony of Judge Charles M. Metzner, Chairman of Judicial Conference's Magistrates Committee); *id.* at 33-40 (report of Judicial Conference on legislation); *1966-1967 Senate Hearings* 241j-244 (report of Judicial Conference on legislation). Finally, the Judicial Conference and the Administrative Office, under the Conference's supervision, each has significant responsibilities under the Act and related laws; for instance, the Judicial Conference must promulgate standards and procedures for the appointment of magistrates (28 U.S.C. 631(b)(5)); the Director of the Administrative Office must determine the number, locations, and salaries of magistrates (28 U.S.C. 633); and the Director must prepare a manual for the use of magistrates "set[ting] forth their powers and duties" (28 U.S.C. 604(d)(4)).

27,342 (remarks of Rep. Poff). Particularly in light of Congress's reliance on the Conference and the Administrative Office, this Court may appropriately give weight to their interpretation of the statute, which is at odds with that of petitioners. See *United States* v. *Peacock*, 761 F.2d 1313, 1318 (9th Cir.) (Kennedy, J.), cert. denied, 474 U.S. 847 (1985); *United States* v. *Rivera-Sola*, 713 F.2d 866, 873 (1st Cir. 1983).

II. MAGISTRATES MAY CONDUCT VOIR DIRE WITHOUT OFFENDING ARTICLE III

Petitioners present the Article III challenge to magistrate-conducted *voir dire* in its starkest form. They do not argue that the quality of the *voir dire* they received was inadequate in any way.[26] They do not claim that any prospective juror was wrongly excluded or not excluded for cause. Nor do petitioners contend that they were not allowed full exercise of their peremptory challenges or that the prosecutor abused his right of peremptory challenge.[27] In short, petitioners acknowledge that they were tried and

[26] The transcript of the *voir dire* shows that the *voir dire* was extensive and probing. No doubt for that reason, when given the opportunity by the magistrate, none of petitioners' counsel requested any additional questioning (see 3/9/87 Tr. 124). See Gomez C.A. Br. 37 ("Gomez was not prejudiced by any specific ruling of the magistrate during jury selection and made no such specific complaint to the district judge * * *.").

[27] For the first time in this case, petitioners now intimate (Br. 3 & n.4) that because the magistrate declined to excuse a prospective juror for hardship after she stated that she might need to attend a funeral of a relative, petitioners might themselves have been compelled to exercise a peremptory challenge to excuse that prospective juror. But petitioners made no objection either before the magistrate or the district court to the decision not to excuse the juror. They therefore cannot now complain that the decision not to excuse the juror might have prejudiced them—a claim that is in any event far-fetched.

convicted by an impartial jury before an Article III judge, yet they claim that their convictions must be overturned solely because an Article III judge did not personally conduct the *voir dire*. In petitioner's view, Article III is not satisfied by the subsequent availability of de novo review by the judge.[28]

Article III, however, imposes no such rigid bar on the use of magistrates. Even accepting petitioners' premise that Article III requires the presence of an Article III judge during a federal felony jury trial (see Br. 30-34),[29] Article III's concerns are satisfied in a preliminary proceeding such as *voir dire* by the availability of de novo review on

[28] Petitioners cannot, of course, claim that Article III judges must personally preside over all aspects of jury selection. Otherwise, the well-settled practice of using jury commissioners to aid in the selection of prospective jurors for the array would be unconstitutional. See Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*; see also *Fay* v. *New York*, 332 U.S. 261, 271 (1947) (overruled on other grounds in *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975)) ("Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause.").

[29] That question is not free from doubt. It is well settled that an Article III judge need not preside over all facets of a federal criminal proceeding, because "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." See *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III."). From that premise, it would seem to follow that Article III is not violated when a federal magistrate presides over a jury trial. But see *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64 n.15 (1982) (plurality opinion). In this case, as in *Raddatz*, however, the Court need not reach that issue, because "Congress has not sought to make any such delegation" (447 U.S. at 681).

the part of the district judge. Virtually all of petitioners' arguments to the contrary were previously rejected by this Court in *United States* v. *Raddatz*, 447 U.S. 667 (1980).

A. In *Raddatz*, the Court considered an Article III challenge to the authority of a magistrate to hear a motion to suppress evidence in a criminal case and to make proposed findings and recommendations to a judge concerning the proper disposition of the motion. Section 636(b)(1) of the Magistrates Act provides that a judge may designate a magistrate to assist the judge in that manner as long as the judge "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

This Court ruled in *Raddatz* that the delegation of suppression proceedings to a magistrate "does not violate Article III so long as the ultimate decision is made by the district court" (447 U.S. at 683). The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction" (*id.* at 681). "[T]he magistrate acts subsidiary to and only in aid of the district court" (*ibid.*). Justice Blackmun, concurring, emphasized that because "the magistrate himself is subject to the Art. III judge's control[], • • • the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department" (*id.* at 685). Whenever "a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct the error" (*id.* at 686 (Blackmun, J., concurring)).

The Court's reasoning in *Raddatz* applies with equal force to the authority of a magistrate to conduct *voir dire*. Here, as in *Raddatz*, de novo review of the magistrate's determinations is available. Hence, "the ultimate decision

is made by the district court" (447 U.S. at 683). The judge in both instances retains "plenary discretion whether to authorize a magistrate to [conduct *voir dire*] and • • • the magistrate acts subsidiary to and only in aid of the district court" (*id.* at 681). In short, as Article III requires, " 'the essential attributes' of judicial power are retained in the Art. III court." See *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion), quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932).[30]

None of the grounds asserted by petitioners for distinguishing this case from *Raddatz* is persuasive. First, petitioners argue (Br. 35) that *voir dire* can be distinguished from a motion to suppress evidence on the ground that "no distinction under Art[icle] III can be drawn between jury selection and the evidence phase of the trial." In fact, an obvious distinction can be drawn: The evidence phase occurs during the trial itself before an impartial jury and determines the innocence or guilt of the accused, while *voir dire* is not part of the presentation of competing versions of facts that is ordinarily considered to constitute the "trial."

Although petitioners suggest that the impact of suppression rulings on the "evidence phase of the trial" is more

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[30] In addition, as Judge Rubin noted, dissenting in *United States* v. *Ford*, 824 F.2d 1430, 1446-1447 (5th Cir. 1987), cert. denied, 108 S. Ct. 741 (1988), it is far from clear that judges have historically been physically present during *voir dire*: "Centuries ago, under the common law of England, • • • court decisions indicate that it was not remarkable for challenges for cause to be tried to and decided by panels of other jurors rather than by the judge, and that such challenges may have been tried outside the presence of the judge" (*ibid.* (footnotes omitted)). See 9 W. Holdsworth, *A History of English Law* 183 (3d ed. 1944); J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 123-124 (1898); Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 Geo. L.J. 438, 442-443 (1928); see also *Hopt* v. *Utah*, 110 U.S. 574, 577 (1884).

remote than the impact of *voir dire*, the converse would seem true. The disposition of a motion to suppress evidence determines what evidence can be admitted at trial. As a practical matter, "the resolution of a suppression motion can and often does determine the outcome of the case" (*Raddatz*, 447 U.S. at 677-678). Jury selection is, of course, an important procedure but it is hard to credit petitioners' suggestion that the *voir dire* of the prospective jurors is typically more important to the resolution of a criminal case than a motion to suppress evidence. Moreover, petitioners are not here contending that the magistrate's role led to a jury that was biased against them. The most that can be said is that the magistrate's decisions may have produced an unbiased jury with a different composition from the unbiased jury that may have been produced if the district judge had presided over the *voir dire*. And the effect of being tried by one impartial jury rather than another is inherently speculative.[31]

Equally unpersuasive is petitioners' assertion (Br. 37-38, 42-45) that *Raddatz* can be distinguished on the ground that *voir dire* examination requires the presence of an Article III judge because meaningful de novo review of *voir dire* proceedings is not possible. A virtually identical argument was made and rejected in *Raddatz*. The Court there acknowledged the potential difficulty of de novo review of suppression hearings, but concluded that, rather than

[31] For this reason, there is no merit to petitioners' suggestion (Br. 36) that *voir dire*, presumably unlike suppression motions, is of "fundamental importance." Both are important. And while *voir dire* implicates the accused's right to trial by an impartial jury, a motion to suppress evidence, depending on the particular constitutional right underlying the motion, may implicate equally fundamental rights, such as those arising under the Fourth, Fifth, or Sixth Amendments. Hence, no valid distinction can be drawn between *voir dire* and suppression motions based on their relative "importance" to the accused.

restrict magistrate authority *ex ante*, the proper course was to assume that courts would be "sensitive to the problems of making credibility determinations on the cold record" (447 U.S. at 679).[32]

The same approach should apply here. While reviewing another's work is never the same as doing the work oneself, it is certainly possible to have effective review of *voir dire* proceedings, just as it is to have effective review of suppression hearings.

To begin with, there are many occasions on which jury selection produces no issue needing review. Unlike suppression motions, which are necessarily won by one side and lost by the other, jury selection often results in both sides being satisfied with the process and the result. Indeed, this appears to be one of those cases, since the parties made no objection either to the substance of the *voir dire* or to the magistrate's decision to seat or excuse particular jurors.[33]

[32] The dissenting justices in *Raddatz* made the same argument petitioners have advanced in this case. See 447 U.S. at 689 (Stewart, J., dissenting) ("It is my view that the judge could not make the statutorily required 'de novo determination' of the critically contested factual issues in this case without personally observing the demeanor of the witnesses."); *id.* at 711 (Marshall, J., dissenting) ("in cases like this one the magistrate's decision is effectively unreviewable if the district judge does not hear the witnesses").

[33] Petitioners repeatedly make much of the fact that the trial judge in this case did not "order or review the *voir dire* transcript" (Br. 3, 9, 44, 48). Because petitioners did not object to the substance of the *voir dire*, including the jurors selected and excluded (see J.A. 18-19), the district court can hardly be faulted for failing to order and review the transcript. For the same reason, petitioners cannot now complain that the scope of de novo review offered by the judge was too narrow. Although the judge spoke most directly to the possibility of de novo review with regard to "any one juror for whom a challenge for cause was not sustained by [the magistrate]," there is no indication that, as

In addition, petitioners exaggerate the relative significance of demeanor in *voir dire* by intimating that it is almost always the crucial factor. As is well illustrated by this case, the *voir dire* process in the federal system consists for the most part of excusing prospective jurors when, in response to a question, they expressly acknowledge their inability to be impartial. See, *e.g.*, 2/9/87 Tr. 21-22 (five prospective jurors raised their hands to declare inability to be impartial in a narcotics trafficking case); *id.* at 43 (The Court: "You feel you would have a problem?"; Ms. Willey: "Yes."); *id.* at 55 (The Court: "Would that experience affect your ability to be fair here?"; Mr. Lederle: "Yes."); *id.* at 57-58 (The Court: "Now, is there anything about the experiences you have just described that would in your mind prevent you from sitting fairly and impartially in this case?"; Ms. Eckelberry: "Yes."); *id.* at 59 (Ms. Ruditsky: "I don't think I would be impartial on this."); *id.* at 73 (Mr. Manigault: "I don't think I can be fair."); *id.* at 74 (The Court: "Anything about the case that would prevent you from being fair?"; Ms. Silverstein: "I think so * * *."); *id.* at 75 (Mr. Bernardo: "I don't think I would be real objective."); *id.* at 94 (Ms. Tavis: "I don't think that I can be impartial in this case."); *id.* at 127 (Mr. Lutz: "I don't feel I have a right to this case."); *ibid.* (Ms. Rozzell: "I do not feel that I can be fair."); *id.* at 131 (Ms. Tufel: "As I sit there, I can tell I am biased.").

Only one prospective juror in this case was excused for cause without making such an explicit disclosure, and that juror was excused after petitioners' counsel explained to the magistrate why bias might be an issue; the government consented to the juror's removal from the panel (see 2/9/87

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petitioners now contend (Br. 3, 44, 48), the judge would have refused to consider any other objection to the *voir dire*.

Tr. 126). Consequently, there was nothing for the district court to review. And even if there had been, the magistrate's decision to excuse one of the prospective jurors for cause could easily have been reviewed on the basis of the transcript.

The parties' exercise of their peremptory challenges in this case, as in most cases, was similarly noncontroversial. One of the important functions of *voir dire* is to allow the parties to hear the prospective jurors' responses and to exercise peremptory challenges based on those responses. As in the case of the disposition of the excuses for cause, the questioning that enlightens the parties' decisions with regard to the exercise of their peremptory challenges can easily be reviewed from the transcript or from the parties' motions to have particular questions asked. None of the parties in this case objected to any question posed by the magistrate or requested any additional questioning. Again, therefore there was nothing for the district court to review. But even if such an objection had been made, the magistrate's determination to ask or not to ask a particular question of the prospective jurors could easily have been reviewed by the district court either in advance or after the fact.

When the need for review of a magistrate's conduct of *voir dire* arises, a district judge possesses considerable discretion in the way he exercises de novo review. How that discretion is exercised depends on the nature of the objection made.

Some review can occur prior to the *voir dire* itself, if the parties submit questions that the magistrate refuses to ask. Other forms of review can take place after the fact or even during the course of the *voir dire*. In most circumstances, the judge will likely find it sufficient to examine the *voir dire* transcript and hear argument by counsel. In some circumstances, however, the judge may decide that it is necessary to question a particular prospec-

tive juror himself; this may occur following the magistrate's jury selection or even during the midst of jury selection, if necessary.[34] And if, as petitioners posit, extreme circumstances arise where the web of errors committed by the magistrate cannot be unwoven, the judge may of course commence the jury selection anew. Cf. H.R. Rep. No. 1609, *supra*, at 3 ("In some specific instances, [it] may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings."); *Raddatz*, 447 U.S. at 680 ("broad discretion includes hearing the witnesses live to resolve conflicting credibility claims"). Yet the possibility that in some circumstances the judge may have to redo the magistrate's work in part or in whole does not mean that, on the whole, the delegation of *voir dire* to magistrates will be ineffective in conserving judicial resources. Article III does not forbid a judge from making the judgment that those rarely incurred costs will be more than offset by savings in the vast majority of cases such as this one.[35]

B. Petitioners next contend (Br. 38-39) that magistrate-conducted *voir dire* violates Article III "because the trial judge's conduct of the subsequent trial proceedings

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[34] If an unanticipated controversy arises during jury selection, the magistrate is free to consult with the judge, who may then decide to intervene. In this case, for example, after petitioners' counsel objected to the magistrate's conducting *voir dire*, the magistrate asked counsel whether "some inquiry should be posed to Judge McLaughlin now" (J.A. 15). The magistrate then consulted with the judge and learned that the judge's "view of the law was the same as mine" (J.A. 16).

[35] Even Judge Oakes, dissenting from the court of appeals' judgment, did not conclude that Article III precludes magistrate-conducted *voir dire*. He instead stated that because he did not believe the practice "can save much judicial time," it should generally be prohibited "in the exercise of our supervisory power" (J.A. 48).

depends upon his personal knowledge of what occurred during *voir dire*." But there is no requirement that the same judge both select the jury and conduct the trial, as petitioners appear to concede (Br. 24 n.15). There is therefore no constitutional magic in ensuring that the judge who tries the case has "personal knowledge" of the jury selection process. Consequently, there is no merit to petitioners' claim that in order to achieve that result Article III must be construed to forbid magistrates from conducting *voir dire*.

C. In challenging the use of magistrates to conduct *voir dire*, petitioners understate (Br. 40-42) the adverse impact of their Article III claim on the achievement of the purposes of the Magistrates Act and wrongly ask this Court, under the guise of constitutional review, to second-guess the wisdom of Congress's policy determination. Petitioners argue, in effect, that magistrate-conducted *voir dire* violates Article III because it is infrequently done; according to petitioners (Br. 42), magistrates conducted *voir dire* only 55 times during the last six months of 1988. Petitioners' point is misleading, however, for several reasons.

First, there is reason to believe that the last six months do not reflect the historical, let alone possible future, use of magistrates to conduct *voir dire*. Because of the uncertainty about the legality of the practice following the Fifth Circuit's 1987 decision in *United States* v. *Ford*, 824 F.2d 1430, 1434-1438 (5th Cir. 1987), cert. denied, 108 S. Ct. 741 (1988), it seems likely that the use of magistrates to conduct *voir dire* was atypically low during the six-month survey period on which petitioners rely. The fact that more than half the judicial districts in the nation specifically list *voir dire* as among magistrates' permissible duties suggests that magistrate-conducted *voir dire* has been relatively

common in the past and will be even more common if this Court upholds the practice.

Second, petitioners underestimate the potential significance of their Article III theory. If petitioners are correct in their more sweeping view of the restrictions imposed by Article III on the use of magistrates—that jury selection is part of the trial and an Article III judge must preside over all aspects of federal court trials—more than magistrate-conducted *voir dire* in felony jury trials may be affected. The authority of magistrates to conduct *voir dire* in misdemeanor and civil cases and, even with the defendant's consent, to try misdemeanor or civil cases may also be placed in doubt.[36] According to the Administrative Office of the U.S. Courts, between July 1, 1987, and June 30, 1988, magistrates tried 1348 misdemeanor and 989 civil cases; during the second half of 1988, magistrates conducted *voir dire* in 61 felony jury trials and, apart from cases they tried, conducted *voir dire* in 178 civil cases.[37]

In any event, this Court should decline petitioners' invitation to substitute its own judgment for Congress's policy determination that magistrates are an important and effective means of relieving the burdens of burgeoning caseloads on federal courts. Petitioners argue (Br. 40 n.25, 42) that magistrate-conducted *voir dire* will not save judges much time, but this Court is not equipped to make that empirical determination, even if it is somehow relevant to the legal issue presented here. Experience will show whether the practice is effective, and if it is not, judges will

[36] See, *e.g.*, *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045-1054 (7th Cir. 1984) (Posner, J., dissenting) (concluding magistrate-conducted civil trials pursuant to Section 636(c) violate Article III even with the parties' consent).

[37] See Letter from Gerard Jones, Program Analyst, Magistrates Division, Administrative Office of the U.S. Courts (Mar. 30, 1989) (copy lodged with the Court). The 61 felony *voir dire* proceedings represents a modification of the number (55) the Administrative Office provided in its letter to petitioners' counsel.

no doubt abandon it. In the meantime, consistently with Congress's intent, judges should be allowed to continue to experiment with assigning magistrates to various "pretrial matters" and "additional duties," such as *voir dire*, to determine which can most effectively ease the federal courts' dockets. After all, Article III does not require that an experiment be successful in order for it to be constitutional.[38]

D. For the first time, petitioners make an independent argument based on the Due Process Clause (Pet. Br. 46-49).[39] Their due process claim, however, is little more than a reformulation of their Article III claim. The due process right identified by petitioners is the "additional procedural protection" of having "the independence and impartiality of judges" who conduct *voir dire* and criminal trial proceedings "enhanced by life-time tenure and an irreducible salary" (Pet. Br. 46). Apart from the absence of an Article III judge, petitioners do not claim that they suffered any other injury. Petitioners' due process claim therefore suffers from the same infirmities as their Article III claim.[40]

[38] This court rejected a similar argument in *Raddatz*. See 447 U.S. at 702 n.5 (Marshall, J., dissenting) ("Experience shows that motions to suppress evidence consume a relatively small proportion of the time of federal district judges.").

[39] Although petitioners referred to "due process" both in their petitions and in their court of appeals briefs, they did not make a due process argument independent of their Article III claim. See, *e.g.*, 88-5014 Pet. 1, 5; 88-5158 Pet. 7; Supp. Pet. i, 16, 18. The court of appeals, accordingly, addressed only petitioners' Article III argument. See J.A. 30-37.

[40] Petitioners' due process claim surely must fail, moreover, to the extent that petitioners are claiming a due process right to have a judge with life tenure and irreducible salary conduct *voir dire*. If due process required that result, most criminal jury trials in state courts would violate due process. Cf. *Raddatz*, 447 U.S. at 685 n.3 (Blackmun, J., concurring).

This Court rejected a similar due process claim in *Raddatz* (447 U.S. at 677-681). Applying the three-factor test described by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and now relied upon by petitioners (Br. 47), the Court concluded that any due process rights implicated by a suppression hearing were adequately protected by the statutory provision of de novo review. The same procedural safeguards apply to *voir dire* and therefore lead to the same result.

First, the "private interests implicated" are similar in this case and in *Raddatz* (447 U.S. at 677). Just as "the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself" (*id.* at 679), the process due at *voir dire* is less exacting than at trial. The proceeding is far more informal, and the court has considerable discretion in deciding the substance and format of the questioning. See *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976).

Second, "the risk of an erroneous determination" is no greater here than it was in *Raddatz*. See 447 U.S. at 677. As in *Raddatz*, "the district court judge alone acts as the ultimate decisionmaker," and "the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings" (*id.* at 680). Depending on the nature of the objections made to the magistrate's *voir dire*, the judge also has great discretion in the way he conducts de novo review, ranging from examination of the transcript to questioning prospective jurors himself.

Third, "the public interest and administrative burdens, including the costs that the additional procedures would involve" (*Raddatz*, 447 U.S. at 677) support the constitutionality of magistrate-conducted *voir dire*. Underlying the enactment and subsequent amendments of the Magistrates Act is "Congress' recognition that a multitude of new statutes and regulations had created an avalanche

of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance." *Mathews* v. *Weber*, 423 U.S. at 268; see *Wingo* v. *Wedding*, 418 U.S. at 463; S. Rep. No. 625, *supra*, at 2-5; H.R. Rep. No. 1609, *supra*, at 4-7. Congress empowered magistrates to consider "pretrial matters" and undertake "additional duties" so that district judges could spend more time on the trials themselves.

Congress's decision to enlist the aid of magistrates rather than increase the number of district judges reflects a considered fiscal and administrative policy decision. It costs much more to create and annually fund a judgeship than a magistracy. See, *e.g.*, *1975 Senate Hearings* 4 (remarks of Judge Metzner on behalf of the Judicial Conference) ("It is our considered judgment that we cannot continue to cope with this problem [of growing caseloads] by increasing the number of district judges and the supporting staffs of law clerks, secretaries, court clerks, court reporters and other employees, with the concomitant need for huge additional physical space."). Creating a magistrate's position is also a more flexible means of addressing the congestion problem in many instances. A magistrate may be hired part-time and may be readily assigned to different tasks in different courthouses and even different districts as the need arises. See, *e.g.*, H.R. Rep. No. 1609, *supra*, at 9, 12-13.

In light of these factors, Congress's decision to permit magistrates to conduct *voir dire* comports with due process. As this Court explained in another context, "some play in the joints of the jury-selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that 'an impartial jury [is] drawn from a cross-section of the communi-

ty,' at the same time take into account practical problems of judicial administration." *Hamling* v. *United States*, 418 U.S. 87, 138 (1974).

III. ANY ERROR IN THE PROCEDURE FOLLOWED IN THIS CASE WAS HARMLESS

Petitioners objected to having the magistrate conduct the *voir dire* in this case, but they did not object to, or seek review of, anything the magistrate did in the course of the *voir dire* proceedings. For that reason, even if the district court committed statutory or constitutional error in assigning the *voir dire* to the magistrate, the error was harmless and does not entitle petitioners to a reversal of their convictions.

As this Court has repeatedly stated, most errors that occur in the process leading to a defendant's conviction are subject to harmless error analysis. Thus, the Court has applied harmless error analysis to a wide variety of errors, such as errors in the grand jury process (see *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988)), violations of the Confrontation Clause (see *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)), errors in jury instructions (see *Pope* v. *Illinois*, 481 U.S. 497 (1987)), and violations of the right to be present at trial (see *Rushen* v. *Spain*, 464 U.S. 114 (1983)). Only in a few settings has the Court applied a rule of per se reversal upon finding that error has been committed. Those include the complete denial of counsel (see *Perry* v. *Leeke*, 109 S. Ct. 594, 600 (1989)), racial discrimination in the selection of grand jurors (see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986)), and adjudication by a biased judge (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)).

Petitioners argue (Br. 28-29, 45-46) that the error in this case—permitting an unauthorized officer to conduct the *voir dire*—is a fundamental one that cannot be harmless under any circumstances. We disagree. In at least some cases, of which this one is a clear example, it is possible to

say with great confidence that the assignment of a magistrate to conduct the *voir dire* could not have prejudiced the defendants. In such cases, reversal of the defendants' convictions would be a miscarriage of justice.

The most significant factor bearing on the harmless error issue in this case is that petitioners voiced no complaints about the way the *voir dire* was conducted, other than objecting to the fact that the magistrate conducted it. In the typical harmless error case, the appellant loses if he fails to persuade the court that he would not have been convicted absent the error in question. In this case, petitioners not only cannot make that argument, but they cannot even claim that the *voir dire* or the trial would have been conducted any differently if the judge, rather than the magistrate, had presided over the jury selection process. See *United States* v. *Rodriguez-Suarez*, 856 F.2d 135, 138 (11th Cir. 1988), cert. denied, 109 S. Ct. 875 (1989).

This case is therefore quite different from a case in which the defendant has been denied his right to counsel, but cannot point to any specific error at trial that prejudiced him. As the Court has held, the right to counsel is fundamental, and absent the opportunity to be represented by counsel, a reviewing court cannot have confidence that the result is a fair one, even if no obvious errors appear on the face of the record. See *Chapman* v. *California*, 386 U.S. 18, 23 (1967). In this case, petitioners' counsel represented them throughout the *voir dire* and were invited to call to the attention of the magistrate or the district judge any flaws in the process that they perceived. Since they failed to note any flaws at all, the Court can have confidence that the *voir dire* was properly conducted, or at least that any error was so insignificant as to fall beneath counsel's notice.

An additional factor bearing on the appropriateness of harmless error analysis in this setting is the nature of

appellate review of claims of error in the *voir dire* process. While defendants have a constitutional right to an impartial jury, they do not have a constitutional right to the impartial jury of their choice. For that reason, reviewing courts typically focus on the defendant's "right to reject, not to select a juror," and the loss of a potentially favorable juror is ordinarily not a ground for appeal. See *Hayes* v. *Missouri*, 120 U.S. 68, 71 (1924); *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642, 646 (1886); *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827); see also *Ross* v. *Oklahoma*, 108 S. Ct. 2273, 2277 (1988) ("Any claim that the jury was not impartial * * * must focus * * * on the jurors who ultimately sat. None of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was impartial.").[41]

Petitioners mistakenly assume (Br. 44) that a defendant is entitled to relief whenever a court's action requires that he unnecessarily exercise a peremptory challenge. At least where the relevant statute allowing peremptory challenges so limits that right, a defendant cannot complain even when a court forces the defendant to exercise his last peremptory challenge by erroneously declining to exclude

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[41] Of course, there are exceptions to this general principle. For instance, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty (*Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968)); and "the Equal Protection Clause forbids the prosecutor to challenge potential jurors soley on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant" (*Batson* v. *Kentucky*, 476 U.S. 79, 89 (1985)). Such issues do not, however, arise in the vast majority of cases (including this one) and, even when they do, they are susceptible to meaningful de novo review by a district judge.

a prospective juror for cause: "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross* v. *Oklahoma*, 108 S. Ct. at 2278. In sum, the record in this case makes it amply clear that, regardless of the magistrate's authority to conduct the *voir dire*, there was no error in the rulings made in the course of the *voir dire*, and certainly no error that would entitle petitioners to reversal of their convictions and a new trial. Under these circumstances, it would serve no purpose to reverse petitioners' convictions in the absence of any cognizable prejudice to the defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Article III of the United States Constitution provides in relevant part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.
>
> * * * * *
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

2. Section 636 of the Federal Magistrates Act provides in relevant part:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment –
>
> > (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
> >
> > (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagrah (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary –

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time

judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council for the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ, *Petitioner,*
v.
UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, *Petitioner,*
v.
UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' JOINT REPLY BRIEF

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ARGUMENT

I. THE GOVERNMENT'S BRIEF FAILS TO ESTABLISH THAT CONGRESS INTENDED THE FEDERAL MAGISTRATES ACT TO AUTHORIZE DISTRICT JUDGES TO ASSIGN JURY SELECTION TO MAGISTRATES IN FELONY CASES EITHER AS A 'PRETRIAL' OR AN 'ADDITIONAL' DUTY

A. Jury Selection Is Not A 'Pretrial' Duty Assignable Under Section 636(b)(1)

Contrary to every court that has considered this issue,[1] and to the government's position in the court of appeals (see C.A. Br. 29-30), the government now argues for the first time that magistrates may conduct felony trial jury selection under 28 U.S.C. § 636(b)(1), which authorizes magistrates to "hear and determine any pretrial matter pending before the court." But this Court repeatedly has indicated, or even held, that jury selection is "part" of trial (Pets. Br. 15-16). Nothing in the legislative history suggests that Congress had a different view. Petitioners' analysis is also strongly supported by the structure of the Act.

The government argues that the reference in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), to jury selection being "a necessary part of trial by jury" was merely a way of emphasizing the importance of peremptory challenges (Br. 9-10). However, *Swain* specifically relied upon *Lewis* v. *United States*, 146 U.S. 370, 376 (1892), in which the Court stated that it was *"holding* . . . that making of [peremptory] challenges was an essential *part* of the trial . . ." (emphasis added). Decided shortly before the enactment of the Magistrates Act, *Swain* is particularly significant for its recognition that this "holding" reflects a *"long and widely held belief." Id.* at 219 (emphasis

---

[1] The courts that have upheld delegation of felony jury selection to magistrates have relied exclusively upon the "additional duties" clause (Pets. Br. 5 n.7). So did the dissenters in *United States* v. *Ford*, 824 F.2d 1430, 1440-42 (5th Cir. 1987) (en banc) (Rubin, J., dissenting), *cert. denied*, ____ U.S. ____, 108 S.Ct. 741 (1988).

added). The Court's subsequent decisions have served to reinforce the view expressed in *Swain*.[2]

The government makes no showing that this "widely held belief" was not shared by Congress. The government simply ignores the judicial and statutory authority (Pets. Br. 15-16) holding that, because jury selection is part of trial, the defendant's right to be present at trial, the public's right to open trial proceedings, and the defendant's speedy trial rights, all attach prior to jury selection.[3] The double jeopardy cases, upon which the government relies (Br. 8), do not hold that jury selection is a pretrial proceeding. Rather, to accommodate the public's significant interest in the resolution of criminal charges on the merits, *see Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 509 n.8 (1984), these cases merely fix the swearing of the

[2] *See Ricketts* v. *Adamson*, 483 U.S. 1, ____, 107 S.Ct. 2680, 2682 (1987) ("Shortly after his trial commenced, while jury selection was underway . . ."); *Griffith* v. *Kentucky*, 479 U.S. 314, 317 (1987) ("On the first day of trial, the prosecution and defense attorneys conducted *voir dire* examination of the jury venire . . ."); *Batson* v. *Kentucky*, 476 U.S. 79, 91 n.15 (1986) (favorably quoting *Swain*); *id.* at 137 (Rehnquist, J., dissenting) (citing *Swain*); *Wainwright* v. *Witt*, 469 U.S. 412, 423 (1985) (equating *voir dire* with "any *other* trial situation") (emphasis added); *United States* v. *Powell*, 469 U.S. 57, 66 (1984) ("trials generally begin with *voir dire*"); *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) ("The trial judge's function at this point *[voir dire]* in the trial is not unlike that of the jurors later on in the trial."); *Carter* v. *Kentucky*, 450 U.S. 288, 291 (1981) ("At the trial, the *voir dire* examination of prospective jurors was conducted solely by the judge."). *See also United States* v. *Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987) (pursuant to his broad discretion to determine the "order of the trial," trial court held opening statements *before* jury selection).

[3] For example, while the government minimizes the significance of the placement of Fed. R. Crim. P. 23 and 24 in the chapter entitled "Trial," it avoids discussion of Rule 43(a), which requires the defendant's presence "at every stage of the trial *including* the impaneling of the jury" (emphasis added).

jury as the point at which the trial may not be "discontinu[ed]" without violating the defendant's constitutional rights. *Downum* v. *United States*, 372 U.S. 734, 737 (1963); *see Gori* v. *United States*, 367 U.S. 364, 368 (1961); *Wade* v. *Hunter*, 336 U.S. 684, 691 (1949).[4]

The government's brief contains no analysis of how jury selection fits into the structure of § 636(b)(1). That subsection distinguishes between the more important, potentially dispositive, pretrial motions, as to which a magistrate may hear and recommend, subject to *de novo* review, § 636(b)(1)(B), and the less important, non-dispositive motions, which a magistrate may "hear and determine," § 636(b)(1)(A). Since jury selection is not one of the enumerated "dispositive" motions,[5] the government's position necessarily assumes that Congress viewed jury selection as a less-important, non-dispositive matter that magistrates would "determine" and then settle by "order," subject to district court review by a "clearly erroneous or contrary to law" standard. This is inconceivable.

By using the terms "determine" and "order," Congress could not have contemplated that the statute encompassed jury selection. Unlike pretrial scheduling, discovery, procedural, or other matters, the selection of a jury is not resolved by an "order." The closest concept in the jury selection process to a final "determination" or "order" is the swearing of the jury. But a magistrate may not select and *swear* the jury without

[4] The sole judicial authority the government cites for the proposition that jury selection is not part of trial is dictum in *Frazier* v. *United States*, 335 U.S. 497, 513 (1949), referring to jury selection as occurring "before trial" (Br. 8).

[5] The practice of holding jury selection shortly before or on the same day as opening statements and the evidentiary phase of trial also shows that Congress could not have intended it to fall within the "dispositive" motion paragraph, which requires the magistrate to make a full written recommendation and allows the parties 10 days to file written objections. § 636(b)(1)(C).

thereby depriving the parties of district court review by *any* standard.[6]

The non-dispositive, pretrial matters Congress intended to authorize under § 636(b)(1)(A) were far less important and far more routine than jury selection at a felony trial. *See, e.g.*, H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2-3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162 ("preliminary procedural motions") [hereinafter "1976 House Report"]; *id.* at 5 ("preliminary or pretrial processing of both criminal and civil cases"); *id.* at 6 ("pretrial motion or proceeding necessary to prepare a case for trial"); *id.* at 7 ("various procedural steps rather than . . . the trial itself"); *id.* at 9 ("preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case"); 122 Cong. Rec. 35,182 (1976) ("preliminary procedural motions") (remarks of Rep. Railsback, a sponsor); *Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 36 (1975) (report of the Judicial Conference) ("motions for continuances, questions on discovery, or matters of procedure") [hereinafter "1975 Senate Hearings"]. As Rowland F. Kirks, director of the Administrative Office of the United States Courts, explained:

> Under this language the court may authorize a magistrate to conduct pretrial conferences in civil and criminal cases, pursuant to the applicable rules of civil and criminal procedure, and to decide motions addressed to calendar matters such as motions for continuances and motions addressed to the pleadings which are not dispositive of litigation.

Improvement of Judicial Machinery: Hearings on H.R. 6150 Before the Subcomm. on Courts, Civil Liberties, and the

[6] This is so because of double jeopardy considerations and because the Federal Rules of Criminal Procedure only provide for questioning and challenging jurors *before* the panel is sworn.

Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 17 (1975).

Contrary to the government's argument (Br. 16), the absence of any framework for district court review of magistrate-conducted jury selection under § 636(b)(1)(A) strongly suggests that Congress did *not* intend to authorize jury selection as a "pretrial" matter. Congress believed that specific, *de novo* review procedures were necessary only for "more important," dispositive matters, as opposed to the "more routine" functions covered by § 636(b)(1)(A). 1975 Senate Hearings, *supra*, at 12 (remarks of William P. Westphal, chief counsel, Subcomm. on Improvements in Judicial Machinery). For example, Congress initially placed dismissal motions under Fed. R. Civ. P. 12(b) in the dispositive category, but subsequently moved such matters to the "non-dispositive" category precisely because they were regarded as "routine," 1975 Senate Hearings, *supra*, at 10 (remarks of Mr. Westphal), and "virtually ministerial," *id.* at 27 (remarks of Hon. Morey L. Sear, chairman, Legislative Committee, National Council of U.S. Magistrates), and thus did not necessitate *de novo* review. If Congress had understood jury selection to be a "pretrial matter" under § 636(b)(1), it would not have relegated it to the non-dispositive category with no procedure for, and a highly deferential standard of, review. In addition, given its overall purpose to "clarify" and "further define" magistrates' specific pretrial duties (Pets. Br. 20-21), it presumably would not have done so without *any* expression of such intent in the statutory language or the legislative history.

B. Jury Selection Is Not An 'Additional Duty' Assignable Under § 636(b)(3)

The government argues that, under § 636(b)(3), the "only limitations on the authority of courts to assign matters to magistrates are those posed by 'the Constitution and laws of the United States'" (Br. 11). Nevertheless, while refusing to concede that the *Constitution* bars magistrates from conducting felony trials (Br. 29 n.29), the government agrees that the *Magistrates Act* does so by omitting felonies from magis-

trates' trial jurisdiction (Br. 14). Thus, despite the government's broad construction of the "additional duties" clause, it must concede that Congress did not intend that clause to authorize delegation of adjudicative functions omitted from the balance of the Act.

We have already shown that Congress did not intend to authorize jury selection as a "pretrial matter" under § 636(b)(1) of the Act. The government concedes that Congress also did not intend to confer felony trial jurisdiction upon magistrates under the Act's trial provisions. Thus, the government can prevail only if it can establish that Congress did not intend its limitation on magistrates' felony trial jurisdiction to extend to the jury selection phase of trial. But its brief makes no such showing. Indeed, the Administrative Office itself, also believing that Congress had determined to deny magistrates felony trial jurisdiction, has advised district judges not to assign discrete trial functions to magistrates (Pets. Br. 18 n.11).

Contrary to the government's brief, petitioners do not contend that "Congress intended to assign magistrates only 'routine, nonjudicial burdens' and 'nonadjudicative tasks'" (Br. 20). We agree that Congress had an overall purpose, both in 1968 and 1976, to expand the adjudicatory authority of magistrates. But the issue is whether Congress intended § 636(b)(3) to be the vehicle for doing so. In this regard, Congress explained that the experimentation it had in mind under § 636(b)(3) consisted of "more administrative functions . . . in aid of the business of the courts." 1976 House Report, *supra*, at 12; *see* Pets. Br. at 21. Every function Congress listed as illustrative of the "additional duties" authorized by § 636(b)(3), such as reviewing default judgments, exonerating or forfeiting bail bonds, appointing counsel, or assisting in preparation of speedy trial plans, was administrative, ministerial, or non-adjudicative. *Id.* The experimentation that Congress had in mind *under § 636(b)(3)* was not the assignment of adjudicatory functions that it had declined to authorize elsewhere in the Act.[7]

[7] Ignoring Sen. Tydings' explanation that the original "additional duties" section was intended to "eas[e] some of the routine nonjudicial burdens of [district] courts" (Pets. Br. 19), the government relies upon his additional statement of intention that magistrates be available in "any capacity" (Br. 17 n.12), and two other general statements that did not, in context, involve delegation of adjudicatory authority over any part of a felony trial. The government omits the context of Sen. Tydings' statement: debate concerning a provision in the proposed legislation, *deleted* from the bill as enacted, granting additional "powers and duties" to magistrates as provided for by subsequent law or amendments to the Federal Rules of Criminal Procedure. *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 87 (1968). While Sen. Tydings explained that this provision was intended to "provide the statutory basis for district court experimentation . . . not in conflict with the Constitution or the laws of the United States," he simultaneously agreed that the Federal Rules of Criminal Procedure could not confer by rule additional "jurisdiction to try criminal cases other than petty or minor cases," *id.*, and that, in any event, such authority would be precluded by "the Constitution and the laws of the United States," *id.* at 88. Of course, the courts themselves gave a narrow construction of the original "additional duties" clause (*see, e.g.*, Pets. Br. 20 n.13), causing Congress to attempt to "clarify" the statute in 1976. It was Congress' intent in 1976 that has been the principal focus of the decisions upholding delegation of jury selection to magistrates.

The government also argues that, by 1976, "magistrate-conducted *voir dire* was already an accepted feature of practice under the Act" (Br. 20), and that Congress intended the practice to continue. But the additional materials to which the government's brief refers actually disprove its point and instead support our thesis that Congress did not intend to override the apparently exclusive practice under which, absent the defendant's consent, district judges conducted jury selection in felony trials.

The Judicial Conference's 1973 subcommittee report, upon which the government relies (Br. 21), surveyed the nation's 91 district courts, 87 of which responded, and established that only three districts had an actual "practice" in *criminal* cases of

delegating *voir dire* to magistrates: Western Michigan, but only in emergencies; Western Pennsylvania, but only on condition that the judge handle all legal questions, and Oregon, which used the practice rarely.[8] The report did not state whether *any* district held magistrate-conduct *voir dire* over a defendant's objection. Judicial Conference, *Report of the Subcommittee Assigned to Study the Conduct of Voir Dire by Federal Magistrates* 3-4 (1973) (emphasis added).

After reporting that the vast majority of districts *disapproved* of having magistrates select juries, particularly in criminal cases, *id.* at 4-8 and Appendix "A" and "B," the subcommittee likewise disapproved, reasoning: "The savings of judicial time are minimal; the risks of increased consumption of judicial time from error and duplication of effort are substantial." *Id.* at 8-9. The report recommended that districts experimenting with the practice limit its use to *civil* cases, and only with *consent*. *Id.* at 9. The Judicial Conference's Committee on the Operation of the Jury System formally "accepted" the report; the Committee on the Administration of the Federal Magistrates System "generally concurred" with it. Minutes of the August 1973 Committee Meeting at 19.

It is doubtful whether, in light of these events, any district courts were delegating jury selection to magistrates in crimi-

[8] Statistics contained in the Senate hearing record on the 1973 Omnibus Judgeship Bill established that, during 1972 in the District of Oregon, 28 of the 30 magistrate activities characterized as "additional duties" under § 636(b) of the 1968 Act consisted of pretrial conferences or motions; only two activities were listed under the category "others." *The Omnibus Judgeship Bill: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 531 (1973). The statistics did not reveal whether any of these "other" activities consisted of jury selection in criminal trials or whether, if they did, the defendants had consented.

Additional districts had rules permitting delegation of *voir dire* but had not implemented such a practice.

nal cases *over the defendant's objection* at the time Congress amended the Act in 1976. The Judicial Conference's 1975 "Jurisdictional Checklist" omitted any reference whatsoever to magistrates conducting *voir dire*. 1975 Senate Hearings, *supra*, at 24-26 ("Jurisdictional Checklist" distributed March 14, 1975). The only reference in the legislative record underlying the 1976 Act that magistrates were then conducting jury selection was Chief Judge Belloni's statement that, in Oregon, the magistrate had presided over jury selection.[9] However, he did not specify whether the magistrate had done so in criminal cases, or where the defendant objected (*see* Pets. Br. 24 n.15).

While Congress may have been aware in 1976 that a few districts had experimented with magistrate-conducted jury selection, almost exclusively in civil cases, and probably always with consent, the most salient circumstance is that the Judicial Conference, which drafted the legislation, did not propose the conducting of *voir dire* to Congress as a potential "additional duty." In light of the 1973 subcommittee report disapproving the practice in general, especially in criminal cases or over a party's objection, the most likely inference is that the Judicial Conference opposed it. Significantly, a representative of the National Council of Magistrates did request an amendment or an indication in the legislative history that Congress intended to authorize magistrates to select juries, 1975 Senate Hearings, *supra*, at 20 (Testimony of Magistrate Morey L. Sear), but Congress did not oblige. In sum, the legislative history establishes that Congress purposefully chose *not* to alter the existing practice in felony trials for district judges to preside at jury selection.

[9] The government erroneously assumes (Br. 23 and n.20) that the Congress that amended the Magistrates Act in 1976 was "aware" of, let alone influenced by, additional testimony given in 1972-73 concerning separate legislation. Moreover, that testimony, and the experimentation with magistrate-conducted *voir dire* to which it referred, preceded the Judicial Conference's disapproval of the seldom-used practice.

The Court should decline the government's invitation to accord "significant weight" (Br. 26) to the suggestion by the Judicial Conference and the Administrative Office that jury selection may be delegated under the "additional duties" clause. The Administrative Office itself cautioned that its interpretation of the Magistrates Act "is not an official directive from the Judicial Conference of the United States or the Administrative Office or a substitute for decisional law," Administrative Office of the United States Courts, *Legal Manual for United States Magistrates* iii [hereinafter *"Legal Manual"]; id.* at 3-3 ("discussion . . . offered merely for guidance"), as the government candidly concedes (Br. 26 n.24). This caveat is particularly apt in light of the complete absence in the manual of any analysis or reference to statutory materials supporting the manual's application of § 636(b)(3). The manual also does not clearly extend its interpretation to criminal cases, nor does it provide guidance for cases in which a criminal defendant objects (*see* Pets. Br. 18 n.11). Meanwhile, the government's reliance upon the Administrative Office's view is selective: the government implicitly rejects the manual's failure to find authority for magistrates to conduct jury selection as a "pretrial matter." *Legal Manual*, *supra*, at 3-8.

The government next argues that assignment of felony jury selection to magistrates is not "inconsistent" with Fed. R. Crim. P. 24(a) because the rule states that the "court" "may" ask the questions during *voir dire* (Br. 12). However, the government does not dispute that, prior to the adoption of the Magistrates Act, the universal interpretation of the rule was that the "court" had to preside at jury selection (*see* Pets. Br. 22-23). There is no possible alternative construction. Indeed, the balance of Rule 24 authorizes only the "court" to permit additional peremptory challenges, subsection "b," or to impanel alternate jurors, subsection "c." The rule's use of permissive language merely gives district judges the option to permit opposing counsel to ask the *voir dire* questions, obviously in the court's presence. While Rule 24 does not explicitly prohibit magistrates from replacing the "court," neither did the Habeas Corpus Act. Nevertheless, because that act assigned responsibility for its application to "[t]he court, or justice, or judge," this Court held in *Wingo* v. *Wedding*, 418 U.S. at 468-69, 472, that assignment of such a function to a magistrate would be "inconsistent."

The government incorrectly suggests that, under Fed. R. Crim. P. 54, "the term 'judge' is *the* term" used when the rules intend to exclude a magistrate from exercising authority; thus, the government discounts Rule 24's use of the term "court" (Br. 12) (emphasis added). However, the Advisory Committee Notes accompanying the 1972 amendment to Rule 54 do not state that "judge" is the *exclusive* term in the rules meant to preclude magistrates from exercising authority. Were that the case, magistrates could conduct all aspects of the "trial" referred to in Rules 23-31. Nor does the government attempt to explain Rule 1, which states that the rules apply to magistrates only when "specifically provided in one of the rules," or the various definitions of "courts" referred to in the rules or related statutes, and cited in our brief (Pets. Br. 26-27), none of which is broad enough to include "magistrates." Indeed, the legislative history establishes that Congress was concerned, in light of *Wingo* v. *Wedding*, that federal laws using either term, "court" or "judge," might be narrowly interpreted to preclude magistrates from exercising authority. 1975 Senate Hearings, *supra*, at 20, 29. Nevertheless, Congress chose to make the "additional duties" clause subject to such laws, contrary to "pretrial matters" under § 636(b)(1).

The government also incorrectly argues both that Congress did not understand the Federal Rules of Criminal Procedure to be "laws" within the meaning of § 636(b)(3) and that "court rules ordinarily do not have that status" (Br. 12-13). During the Senate hearings, Magistrate Sear observed that the clause "'notwithstanding any provision of the law to the contrary' was intended by the drafters to be broad enough to include a magistrate where court and judge are used in statutes and *rules* . . ." 1975 Senate Hearings, *supra*, at 29 (emphasis

added); *id.* at 20. Judge Metzner, representing the Judicial Conference, agreed. *Id.* at 30. Moreover, just last year, the Court again noted that the Federal Rules of Criminal Procedure supersede inconsistent prior law and are "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia* v. *United States*, ___ U.S. ___, ___, 108 S.Ct. 2369, 2374 (1988); *see* 8 Moore's Federal Practice ¶ 1.02 (2d ed. 1989).

Contrary to the government's argument (Br. 13), § 636(a)(1), by transferring to magistrates the commissioners' existing authority under "law" and "rules," did not reflect any Congressional understanding that the Federal Rules of Criminal Procedure are not "laws." Prior to 1968, commissioners' duties were contained in myriad statutes and rules. Congress in 1968 merely wanted to be clear that magistrates were to assume *every* such duty, no matter what the source of authority.

Finally, contrary to the government's brief (Br. 37), petitioners' reference to Fed. R. Crim. P. 25(a) (Pets. Br. 24 n.15) was not a concession that the same judicial officer need not preside throughout the trial (Br. 37). To the contrary, Rule 25(a) permits one "judge" to substitute for another *only* where the first judge suffers "death, sickness or other disability" *and* the replacement judge "certif[ies] familiarity with the record."[10] If, as we argue, jury selection is part of trial, this provision also would be "inconsistent" with magistrate-conducted *voir dire:* it requires a "judge" to commence the trial and severely limits the circumstances under which such a judge can be replaced. In this case, a magistrate rather than a judge began the trial and the judge who replaced him did not read, let alone certify familiarity with, the trial record.

II. THE GOVERNMENT'S BRIEF FAILS TO ESTABLISH THAT, UNDER ART. III AND THE DUE PROCESS CLAUSE, A MAGISTRATE MAY CONDUCT JURY SELECTION IN A FELONY TRIAL OVER THE OBJECTION OF THE DEFENDANT

The government does not seriously argue that a magistrate may, consistent with Art. III and the Due Process Clause,

[10] The constitutionality of mid-trial judicial substitution is addressed *infra* at 14-15.

preside at a felony trial (*see* Br. 29 n.29). Without *any* constitutional analysis, the government instead characterizes *voir dire* as a "preliminary proceeding" (Br. 29), equates it with the *pretrial* suppression hearing procedure upheld in *United States* v. *Raddatz*, 447 U.S. 667 (1980), and concludes that the same result should apply here. But the government offers no reasoned basis for the Court to distinguish this case from the numerous authorities discussed in petitioners' opening brief (pp. 15-16, 35-40), and *supra* at 1-3, which characterize jury selection as part of trial.

Even if the Court nevertheless concludes that *voir dire* is preliminary to trial, *Raddatz* does not control this case. The government now exalts the criminal defendant's individual interest in the outcome of pretrial suppression hearings, citing *Raddatz's* observation that such motions may "determine the outcome of the case." *Raddatz*, 447 U.S. at 678 (Br. 32). But *Raddatz* then went on to fully accept the government's argument that the primary interest at stake in a suppression hearing has "nothing" to do with "the criminal law objective of determining guilt or innocence" and the defendant's greater interest in "'the reliability of jury verdicts'" (citation omitted). *Id.*[11]

Jury selection, on the other hand, plays a "critical function" in assuring the defendant's right to an impartial jury, and therefore the reliability of jury verdicts. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) (and cases cited in Pets. Br. at 35-40). As discussed in our opening brief, the judge

[11] In *Raddatz*, the government argued that the primary interest at stake in a suppression hearing is "deterrence of official misconduct" rather than "the accused's paramount interest in liberty." Brief for the United States at 45, *United States* v. *Raddatz*, *supra*. "[T]he suppression remedy is ordinarily concerned with the deterrence of official misconduct or other societal interests and not with the more fundamental determination of guilt or innocence." *Id.* "Indeed, the defendant's stake in the outcome of a suppression hearing is significantly less than the individual interests implicated by various civil proceedings." *Id.* at 46.

conducting jury selection must make an infinite variety of judgments. These are often too subtle to be identified on the record or to be subject to review (Pets. Br. 42-45). The government's brief provides no authority for its bald claim that the demeanor of the participants in jury selection is rarely important and the overall process is rarely controversial (Br. 34-35).[12] In this case, trial counsel's failure to raise specific claims of prejudice before the district judge must be discounted both because of the inherent inability to recreate or request review of this process and because of the absence of any statutory or local procedure and standard for such review. *Compare United States* v. *Raddatz*, 447 U.S. at 680-81 ("the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself") (*see* Pets. Br. 48).

As discussed *supra* at 12, petitioners certainly do not "concede" that the same judge need not preside at jury selection and at the balance of the trial (Br. 37). There is substantial authority that the same judge must be present throughout the trial in order to provide essential continuity of knowledge and judgment (Pets. Br. 38-39). *See Simons* v. *United States*, 119 F.2d 539, 544 (9th Cir.), *cert. denied*, 314 U.S. 616 (1941) (defendant has Art. III right to presence of the same judge throughout trial, although he may waive it); *Freeman* v.

[12] The government's generalization that the *voir dire* process in federal court consists of nothing more than excusing jurors who immediately confess bias (Br. 34) is not supported by the record of this case. Demeanor proved relevant in the magistrate's decision to grant or deny the defendants' request to excuse several jurors. *See, e.g.*, 2/9/87 Tr. 70-71 (juror Kuadra excused by consent because of minor language difficulty); *id.* at 78-79 (juror Wong, who had tried marijuana, excused despite her belief she could be "impartial"); *id.* at 87-94 (over the government's objection, the magistrate excused two jurors with potential scheduling concerns, but denied defendants' request to excuse a third); *id.* at 124-26 (magistrate reversed himself and, with government's consent, excused juror who worked for Immigration and Naturalization Service but insisted she could be fair).

United States, 227 F. 732, 759-60 (2d Cir. 1915) (substitution of judge violated defendant's Sixth Amendment right to trial by jury); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 392 (1982) ("In the absence of consent, it would seem that Rule 25(a) cannot be validly applied, and that the death or disability of the judge requires that a mistrial be granted.").[13] Whether or not Rule 25(a) is constitutional, it at least attempts to meet the above concerns by requiring absolute necessity for the substitution in addition to the successor judge's certification of familiarity with the record. The district judge below established no necessity for delegating jury selection, nor did he familiarize himself with the record.

Finally, the government greatly exaggerates the breadth of petitioners' Art. III argument (Br. 38). A narrow holding that jury selection in a federal felony trial may not be delegated to a magistrate over the defendant's objection would not threaten any provision of the Magistrates Act. This case does not involve the magistrates' consent trial jurisdiction or the Act's "pretrial" hearing provisions.

III. THE BASIC STRUCTURAL VIOLATION DEPRIVING PETITIONERS OF THEIR RIGHT TO A LIFE-TENURED ART. III JUDGE REQUIRES THAT THEIR CONVICTIONS BE REVERSED

The government's "harmless error" argument fails to consider that the error in this case involved a denial of a fundamen-

[13] More recently, other courts have noted, without deciding, that judicial substitution without consent raises significant Fifth and Sixth Amendment and Art. III problems. *See, e.g.*, *Whalen* v. *Ford Motor Credit Co.*, 684 F.2d 272, 273 n.4 (4th Cir.) (*en banc*), *cert. denied*, 459 U.S. 910 (1982); *United States* v. *Lynch*, 598 F.2d 132, 135 n.7 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Randel* v. *Beto*, 354 F.2d 496, 500-01 (5th Cir. 1965). *But see United States* v. *Boswell*, 565 F.2d 1338 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978) (declining to reach constitutional issue because substitution of magistrate for judge during closing arguments, while violative of Rule 25(a), was "harmless error"); *Connelly* v. *United States*, 249 F.2d 576, 580-81 (8th Cir. 1957) (upholding previous Rule 25(a) where judge died after verdict and provisions of statute were "strictly complied with").

tal "structural protection" built into the trial process by Art. III and Congress: the right to a life-tenured district judge during the critical jury selection phase of a felony trial. "Harmless error" analysis does not apply both because of the nature of this violation and because of the difficulty of identifying specific prejudice from such a violation in a particular case.

Initially, the government's brief does not even attempt to distinguish *Wingo* v. *Wedding*, in which the Court reversed the judgment denying a habeas corpus petition without subjecting the magistrate's involvement in recommending this result to "harmless error" analysis. Indeed, in *Wingo*, the district court reviewed the magistrate's recommendation far more closely than in this case: it listened to the entire tape recording of the hearing testimony before approving the magistrate's detailed findings and conclusions. 418 U.S. at 466. This rigorous review was far more likely to identify and correct error than the *ad hoc* procedure casually fashioned in this case to "review" the inherently less-reviewable *voir dire* process. *See also United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (judgment rendered by non-Art. III court automatically reversed).

In spelling out the contours of "harmless error" analysis, the Court in recent years has repeatedly noted that some errors "are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). *See Bank of Nova Scotia* v. *United States*, ___ U.S. ___, ___, 108 S.Ct. 2369, 2375 (1988) (fundamental "structural protections"); *Rose* v. *Clark*, 478 U.S. 570, 578 n.6 (1986) (errors that "abort[] the basic trial process"). Unlawful discrimination in the selection of the grand or petit jury is such a defect because it "cast[s] doubt on the integrity of the whole judicial process." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion). *See Batson* v. *Kentucky*, 476 U.S. 79 (1986) (blacks improperly excluded from petit jury); *Vasquez* v. *Hillery*, 474 U.S. 570, 577-78 (1986) (blacks excluded from grand jury) (plurality opinion); *Ballard* v. *United States*, 329 U.S. 187 (1946) (women

excluded from grand jury). Similarly, even in the absence of specific error, a conviction must be reversed where a trial judge's inherent conflict of interest cast doubt on the integrity of the proceeding. *Tumey* v. *Ohio*, 273 U.S. 510 (1927) ("[n]o matter what the evidence was against him, [the defendant] had the right to have an impartial judge").

"Harmless error" analysis presupposes a trial by "a fairly selected, impartial jury, supervised by an impartial *judge*." *Rose* v. *Clark*, 478 U.S. at 579 (emphasis added). Such a trial cannot occur where the adjudication is by the "wrong entity." *Id.* at 578. As in *Wingo* v. *Wedding*, the magistrate who selected the jury in this case was empowered neither by statute nor by the Constitution. *See, e.g., Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978) ("The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."); *Aldinger* v. *Howard*, 427 U.S. 1, 15 (1976) ("federal courts . . . are courts of limited jurisdiction marked out by Congress"). Whether or nor the magistrate was "impartial," he was not a "judge," and thus was the "wrong entity" to conduct this proceeding. While he did not have a direct financial stake in the outcome comparable to that of the presiding officer in *Tumey* v. *Ohio* or the former U.S. Commissioners, he suffered from the inherent lack of independence that the Constitution's Framers thought essential, and therefore required under Art. III.

Where fundamental constitutional or statutory "structural protections" in the trial process are violated, the cases impose an irrebuttable "presumption" of prejudice. *Bank of Nova Scotia* v. *United States*, 108 S.Ct. at 2375 (and cases discussed therein). Thus, in *Waller* v. *Georgia*, 467 U.S. 39 (1984), the Court unanimously ordered a new suppression hearing, without examining the content of the existing hearing record, where the defendant had been denied his constitutional right to have such a hearing held in public. In extending to pretrial suppression hearings the Sixth Amendment right to a public trial, the Court agreed that the defendant did not have to show

"specific prejudice," *id.* at 49-50, reasoning: "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Id.* at 49 n.9.[14] *See also Peters* v. *Kiff*, 407 U.S. 503 (exclusion from jury of class of citizens requires reversal of the conviction even though "proof of actual harm, or lack of harm, is virtually impossible to adduce").

Similarly, the Framers "plainly thought" the benefits of the structural protections guaranteed by Art. III to be "real," even though, to paraphrase *Waller*, they are "frequently intangible, difficult to prove, or a matter of chance" (*see, e.g.*, Pets. Br. 30-34). Indeed, Art. III's structural protections, in the context of jury selection, go to the heart of the fact-finding process (Pets. Br. 35-40). The presiding officer must make countless discretionary judgments, the impact of which may not be apparent to the participants or sufficiently concrete to be the basis for complaint to a reviewing court. A defendant's strong constitutional interest in having the same judge establish control of the jury and acquire knowledge necessary for him to make discretionary judgments during subsequent stages of the trial is likewise subtle and "difficult to prove" in a particular case. *See supra* at 12, 14-15.

The government maintains that this is a "clear example" of a case in which the Court may conclude "with great confidence" that petitioners were not prejudiced (Br. 42-45). But the cases it cites involved evidentiary or procedural errors that either were *de minimis* in nature or gave rise to discrete, readily-identifiable prejudice more easily subject to "harmless error"

[14] The principal underlying benefits of the public-trial guarantee identified in *Waller* are "'effective restraint on possible abuse of judicial power,'" 467 U.S. at 46 n.4, quoting *In re Oliver*, 333 U.S. 257, 270 (1948), and pressure upon all participants to perform more responsibly. These values are at least as "intangible" as the concerns underlying Art. III.

analysis.[15] More to the point are the jury selection cases in which the defective process employed created a potential for prejudice that review of the trial transcript could not dispel.[16] This, too, was such a case.

If the magistrate had conducted the entire trial without committing any specific mistake, we doubt the government would suggest such a fundamental structural error was harmless. Unless the government's trivialization of the jury selection process is accepted, we fail to see how confining this error to jury selection may lead to a different result.

[15] *See, e.g., Bank of Nova Scotia* v. *United States*, *supra* (procedural errors in grand jury presentation); *Ross* v. *Oklahoma*, ____ U.S. ____, 108 S.Ct. 2273 (1988) (use of peremptory challenge to excuse juror who should have been excused for cause eliminated potential for prejudice, especially where state law intended peremptories to be so used); *Delaware* v. *Van Arsdall*, *supra* (improper curtailment of cross-examination concerning bias of a single prosecution witness); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (error in specific jury instruction where the evidence was overwhelming); *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam) (potential for prejudice in *ex parte* contact between judge and juror dispelled by post-trial hearing).

[16] *See, e.g., Batson* v. *Kentucky*, *supra* (unexplained pattern of racially-suspect peremptory challenges); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (exclusion of women); *Ham* v. *South Carolina*, 409 U.S. (1973) (failure to adequately inquire during *voir dire* about jurors' potential racial prejudice); *Peters* v. *Kiff*, *supra* (selection procedures that discriminate against blacks); *Aldridge* v. *United States*, 283 U.S. 308 (1931) (failure to adequately inquire about potential racial prejudice); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892) (denial of defendant's right to be present during *voir dire*).

CONCLUSION

The judgment of the court of appeals should be reversed.

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II.

FEDERAL CRIMINAL DEFENDANTS WHO ARE TRIED UPON FELONY CHARGES POSSESS THE PERSONAL RIGHT TO HAVE AN ARTICLE III JUDGE ADMINISTER, CONDUCT AND OVERSEE THE VOIR DIRE PROCESS AT SUCH TRIAL. A FEDERAL DISTRICT JUDGE'S DELEGATION OF VOIR DIRE ADMINISTRATION TO A FEDERAL MAGISTRATE DENIES THE DEFENDANT OF HIS RIGHTS UNDER ARTICLE III, AND THEREFORE TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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QUESTIONS PRESENTED

I.

DOES THE MAGISTRATES ACT AUTHORIZE A DISTRICT JUDGE, OVER A CRIMINAL DEFENDANT'S OBJECTION, TO DELEGATE JURY SELECTION IN A FELONY TRIAL TO A MAGISTRATE WHILE RESERVING AUTHORITY TO REVIEW DE NOVO THE MAGISTRATE'S RULINGS ON CHALLENGES FOR CAUSE?

II.

DOES A DISTRICT JUDGE'S DELEGATION OF JURY SELECTION TO A MAGISTRATE, WITH THE RESERVATION OF A DE NOVO REVIEW AUTHORITY CONCERNING UNSUCCESSFUL DEFENSE CHALLENGES FOR CAUSE, VIOLATE A FELONY DEFENDANT'S ARTICLE III AND DUE PROCESS RIGHTS?

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers. The NACDL was founded over 25 years ago to advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers.

Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. The NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of these objectives, and of the

criminal justice system, is the protection of an individual's constitutional rights to an Article III judge to preside over the defendant's felony trial and to due process of law.

The decisions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York present a threat to the aforementioned rights. This brief supports the petitioners' arguments that the decisions below should be reversed and petitioners granted a new trial with a United States District Judge Presidinganer the voir dire examination.

Both parties have consented to the filing of this amicus curiae brief.

SUMMARY OF ARGUMENT

The United States District Court for the Eastern District of New York should not have delegated to a federal magistrate the administration of voir dire in petitioners' felony trial. Such delegation is in direct violation of the Magistrates Act, Article III, and the Due Process clause of the Fifth Amendment.

Voir dire is not a "pretrial matter" within the scope of the authority vested in federal magistrates. Voir dire is an element of the "traditional adjudicatory duties" of Article III district judges.

Due process demands that Article III district judges administer voir dire in felony trials to ensure the fundamental fairness of such trials.

ARGUMENT

I.

THE DELEGATION BY UNITED STATES DISTRICT JUDGE JOSEPH M. McLAUGHLIN TO A FEDERAL MAGISTRATE OF THE JURY SELECTION IN PETITIONERS' FELONY TRIAL WAS NOT AUTHORIZED BY THE MAGISTRATES ACT, 28 U.S.C. § 636.

The first question presented to this Court is whether the Magistrates Act authorizes United States district judges to delegate jury selection duties in felony trials to federal magistrates. The NACDL, as amicus curiae on behalf of petitioners, respectfully submits to this Court that the Magistrates Act does not authorize federal magistrates to conduct the voir dire process in federal felony trials.

Section 636(b) of the Magistrates Act grants federal magistrates four powers. First, a federal magistrate may hear and

determine, with certain exceptions, any pretrial matter. The magistrate's determination is then subject to district court review under a clearly erroneous standard. 28 U.S.C 636(b)(1)(A). Second, a federal magistrate may conduct evidentiary hearings and make findings for disposition of certain matters in both criminal trials and post conviction relief proceedings. The district judge retains a de novo power of review over the magistrate's findings or recommendations. 28 U.S.C. § 636(b)(1)(B). Third, a district judge may assign to a magistrate "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. §636(b)(3). Finally, the federal magistrate may serve as a special master under certain statutes or by consent of the

parties to a civil action. 28 U.S.C. § 636(b)(1). Ultimately, the Magistrates Act is silent as to the authority of a federal magistrate to conduct the voir dire in a felony case. United States v. Trice, No. 87-2452, slip op. at 8, 9 (8th Cir. Dec. 29, 1988).

In order to determine whether the Magistrates Act authorizes federal magistrates to conduct voir dire in felony cases, two basic inquiries become necessary: (1) whether the phrase "pretrial matter" as used in § 636(b)(1)(A) is construed broadly enough to encompass voir dire duties in felony cases, and (2) whether allowing a magistrate to conduct voir dire in a felony case delegates a duty inconsistent with the Constitution and laws of the United States.

The NACDL respectfully contends that administration of voir dire in federal felony trials is not a "pretrial matter" under § 636(b)(1)(A). The pretrial matters envisioned by the statute deal with duties which are largely fact gathering and ministerial in nature, i.e. pretrial suppression hearings and 28 U.S.C. §2254 evidentiary hearings. The important distinction between such pretrial matters and voir dire is that pretrial matters envisioned by the Magistrates Act are subject to subsequent scrutiny by the district judge during his administration of the actual trial itself or determination of the merits of the habeas corpus petition. Voir dire, on the other hand, is a purely personal and subjective task, especially within the criminal justice system where the district judge more often than not actually performs the examination of the

potential jurors. In handling voir dire the district judge is faced with not only the questioning of potential jurors but with receiving those jurors' responses, be they verbal or physical. There is much in the transcript which is incapable of being recorded. Certain mannerisms of the panel members, their tone of voice in responding, and their attitudes in general can only be perceived by the district judge as he administers the voir dire. The cold transcript record cannot provide adequate subsequent district judge review of voir dire proceedings.

Despite the purely personal nature of voir dire administration, the very basis of voir dire within our legal system demands that the administration of voir dire be conducted by a district judge rather than a magistrate. "A legal trial at common-law

presupposes and generally is predicated upon the presence at all stages thereof of a presiding justice under whose direction the case is tried." 75 Am. Jur. 2d, Trial §45 (1974). Furthermore, "the importance of voir dire to the American legal system is tied to the role juries play in our legal system, as well as the interplay between judge and jury." Trice, supra at 12.

> "At common law only the judge could preside over jury selection in felony cases... [S]uch concern plainly rejects the view that jury selection is a preliminary and essentially ministerial act. At the least it is an essential instrument to the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process, if not the trial guarantees of the Sixth Amendment in Section 2 of Article III themselves."

United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987).

Moreover, "[e]lements of voir dire continue to implicate greater societal rights... [v]oir dire communicates to the people by satisfying the axiom that to perform its highest function in the best way justice must satisfy the appearance of justice." Trice, supra at 13 (citations omitted). This aspect is readily evident in this Court's decisions of Batson v. Kentucky, 476 U.S. 79 (1986), Swain v. Alabama, 380 U.S. 202 (1965), McClesky v. Kemp, 481 U.S. ___, 95 L.Ed.2d 262 (1987), Lockhart v. McCree, 476 U.S. 162 (1986), and this Court's recent grant of certiorari in the case of Teague v. Lane, ____ U.S. ____, 99 L.Ed.2d 268 (1988). As Circuit Judge Heaney of the United States Court of Appeals for the Eighth Circuit stated in the majority opinion in Trice

> "[u]nder both a historical light and a light cast by Supreme Court opinions, jury selection plays a

vastly greater role than merely assuring defendants' rights... [s]ince voir dire plays broader societal roles, we suspect that Congress did not intend to treat voir dire as simply preliminary. Voir dire is largely related to the task of deciding cases, similar to the matters excepted to subparagraph (A), [28 U.S.C. 636(b)(1)(A)] rather than the task of either fact gathering or charging, similar to matters traditionally envisioned by subparagraph (A). Subparagraph (A) was plainly intended for less important matters than voir dire."

Trice supra, at 14-15.

Therefore, in light of the importance of voir dire to the felony trial as a whole, the subjective and personal nature of the administration of voir dire, and the impracticability of adequate review by district judges of "magistrate-administered" voir dire proceedings, the voir dire process cannot be considered a "pretrial matter" as envisioned by the Magistrates Act.

The NACDL also contends that the administration of voir dire by a federal magistrate is inconsistent with the Constitution and laws of the United States. Although Congress intended district judges to experiment freely in delegating duties to federal magistrates, the delegation of voir dire was not within Congress' contemplation when revising the Magistrates Act in 1976. Congress noted that experimentation by district judges would increase the time available to judges "for the careful and unhurried performance of their vital and traditional adjudicatory duties." H.R. Rep. No. 1609, 94 Cong. 2d Sess. 10, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172 (emphasis added). The key phrase to the congressional intent underlying the Magistrates Act is "traditional adjudicatory duties." As Circuit Judge Higginbotham of the United

States Court of Appeals for the Fifth Circuit has stated,

> "[t]he trial lawyer knows that who decides the truth from the evidence may be as important as the evidence. The process of selecting the persons to hear the evidence inevitably introduces the trial players to the jury and itself triggers the decisional process. We have secured the rights to the selection process as an essential part of trial by jury and struggled to eliminate bias in its function.
>
> It is then difficult to view jury selection as fit for delegation to magistrates as part of a congressional effort to free judges for performance of their 'traditional adjudicatory duty.' Rather, we see jury selection as such an integral component of trial that we are not persuaded that Congress envisioned its delegation to magistrates." Ford, supra at 1438.

Therefore, after analyzing the inquiries of "pretrial matters" and "traditional adjudicatory duties" it is clear that the Magistrates Act does not authorize district judges to delegate

administration of voir dire to magistrates. Although a federal magistrate may be as well suited to conduct voir dire as an Article III district judge, competency and legal knowledge are irrelevant to the issue of statutory authorization which is present here. The Magistrates Act goes neither to the experience nor the knowledge of the magistrate; rather, Congress has seen fit to preserve the criminal defendant's right to an Article III district judge administering the voir dire in his felony trial.

II.

FEDERAL CRIMINAL DEFENDANTS WHO ARE TRIED UPON FELONY CHARGES POSSESS THE PERSONAL RIGHT TO HAVE AN ARTICLE III JUDGE ADMINISTER, CONDUCT AND OVERSEE THE VOIR DIRE PROCESS AT SUCH TRIAL. A FEDERAL DISTRICT JUDGE'S DELEGATION OF VOIR DIRE ADMINISTRATION TO A FEDERAL MAGISTRATE DENIES THE DEFENDANT OF HIS RIGHTS UNDER ARTICLE III, AND THEREFORE TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Much of the controversy concerning a federal magistrate's administration of voir dire in felony trials revolves around the Magistrates Act. However, the NACDL contends that even if this Court determines that the Magistrates Act authorizes magistrates to conduct voir dire in felony cases, federal defendants being tried on felony charges have the personal right to an Article III judge who will conduct voir dire, and that a deprivation of this right denies the federal defendant due process under the Fifth Amendment.

This contention is not grounded in congressional intent; rather, such argument focuses on the fundamental fairness of the federal defendant's trial when he is denied his right to an Article III judge at voir dire.

> "The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscure, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarialy long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses and to express his opinion upon the weight of the evidence and the credibility of the witnesses." Kettenbach v. United States, 202 F. 377, 385 (9th Cir. 1913).

Additionally,

> "Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982) (emphasis added).

It is against the backdrop of the above two quotations that the need for the safeguard of an Article III judge conducting voir dire becomes readily evident. Fundamental fairness is an illusive inquiry, one which practically demands contemporaneous perception of the events in question. It is for this reason that review of voir dire, even under a de novo standard, is impracticable. A district judge cannot adequately review the fundamental fairness of voir dire by merely reading the transcript of such proceedings

or reviewing the questions presented to the jurors.

> "Nonverbal communication is extremely important when assessing juror desirability because it may provide invaluable information about the juror personally and how that prospective juror feels about the case at hand...
>
> Every attorney should be sensitized to the messages sent by body language so as not to pass up an important opportunity to gain invaluable information about prospective jurors as well as every other participant in the trial process.
>
> The cues sent by the body are truly 'language.' They can communicate the thoughts, intentions and desires of the persons sending them." L. Blue & J. Naida, Jury Selection: Strategy & Science § 6:01, 6:11 (1986).

Therefore, fundamental fairness and due process require the Article III judge who is to hear the evidence in the criminal trial to also conduct the voir dire examination because the judge must be able

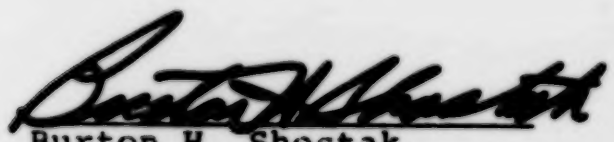
to examine the potential jurors by both their actions and words, and for the reason that any attempted review of voir dire proceedings on a de novo basis, absent plain error, would be inadequate.

CONCLUSION

For the foregoing reasons and authorities in support thereof the decision of the United States Court of Appeals for the Second Circuit should be reversed and this cause be remanded to the United States District Court for the Eastern District of New York for a new trial with directions to the district court that the voir dire be conducted by an Article III judge.

Respectfully Submitted

MOLINE, OTTSEN, MAUZE',
LEGGAT & SHOSTAK



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing "Amicus Curiae Brief of the National Association of Criminal Defense Lawyers in support of the petitioner" have been furnished by U.S. mail to: (1) Joel B. Rudin, Attorney for Jose Gomez, 45 Rockefeller Plaza, Suite 730, New York, New York 10111, and (2) Jerald Levine, Attorney for Diego Chavez-Tesina, 73-19 Broadway, Jackson Heights, New York 11372, and (3) William C. Bryson, Acting Solicitor General, United States Department of Justice, Washington, D.C. 20530 on this 22nd day of February, 1989.

Burton H. Shostak